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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 151

PEARL E. DEPUTY AND THE SUSSEX TRUST COMPANY,
ETC., PETITIONERS

vs.

PIERRE S. DUPONT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 28, 1939
CERTIORARI GRANTED OCTOBER 9, 1939

INDEX.

	Page
Docket Entries	1
Declaration	5
Bill of Particulars	10
Defendant's Pleas	11
Bill of Exceptions	11
Stipulation as to Certain Issues, &c.	12
Stipulation as to Certain Facts	1
Income Tax Return of Pierre S. duPont for Calendar Year 1931 ..	21
Claim for Refund	29

Exhibits to Stipulation.

(A) Certified Copy of Deed of Trust Dated April 2, 1930, Between H. Rodney Sharp, Trustee, and Pierre S. duPont ..	40
(B) Certificate of Incorporation of Welfare Foundation Incorporated	43
(C) Minutes of Special Meeting of Board of Directors of Christiana Securities Company, December 12, 1919	47
(D) Agreement Dated December 23, 1919 Between Christiana Securities Company and Pierre S. duPont	48
(E) Memorandum December 11, 1919, From Treasurer Christiana Securities Company to Board of Directors	50
(F) Agreement Dated January 4, 1923, Between Christiana Securities Company and Pierre S. duPont	51
(G) Agreement Dated August 12, 1925, Between Christiana Securities Company and Pierre S. duPont	53
(H) Agreement Dated October 28, 1926, Between Christiana Securities Company and Pierre S. duPont	56
(I) Agreement Dated January 21, 1929, Between Christiana Securities Company and Pierre S. duPont	62
(J) Letter Dated December 22, 1919, From Ireneé duPont, President, to Finance Committee	65
(K) Contract Between E. I. duPont de Nemours and Company and Certain Named Persons, In Re Compensation to Executive Committee Members	66

INDEX—Continued.

	Page
(L) Letter Dated December 20, 1919, From Irene duPont, President, to Lamont duPont and Others	74
(M) Four Ledger Sheets of Laird & Company, Brokers, Showing Transactions in duPont Common Stock From December 1, 1919, to July 2, 1920	Not printed
(N) Trust Agreement Dated November 30, 1918, Between Pierre S. duPont and H. Rodney Sharp	75
(O) Agreement Dated September 26, 1919, Between Pierre S. duPont and H. Rodney Sharp	78
(P) Deed of Trust for Delaware School Auxiliary Fund Dated July 29, 1919	85
(Q) Letter Dated March 10, 1921, Irene duPont to P. S. duPont	91
(R) Letter Dated April 1, 1921, Pierre S. duPont to W. S. Carpenter	Not printed.
(S) Agreement Dated October 25, 1929, Between Delaware Realty and Investment Company and Pierre S. duPont	98
Opening Statement for Plaintiff	104
Opening Statement for Defendant	117
Plaintiff's Requests for Findings of Fact	192
Plaintiff's Requests for Conclusions of Law	200
Defendant's Requests for Findings of Fact	201
Defendant's Requests for Conclusions of Law	207
Findings of Fact, Conclusions of Law and Opinion of Court	208
Plaintiff's Exceptions to Findings of Fact, Conclusions of Law and Opinion of the Court	244
Order Overruling Exceptions	251
Judgment	252
Petition for Appeal	252
Assignments of Error	253
Order Allowing Appeal	254
Bond for Costs on Appeal	Not printed
Citation	Not printed
Orders Extending Return Day of Citation	Not printed
Stipulation for Diminution of Record	255
Clerk's Certificate	261
Proceedings in U. S. C. C. A., Third Circuit	263
Stipulation and order substituting parties appellee	263
Minute entry of hearing	264
Opinion, Buffington, J.	264
Concurring opinion, Maris, J.	267
Judgment	268
Clerk's certificate	269
Order allowing certiorari	270

INDEX—Continued.

PLAINTIFF'S WITNESSES.

	Page
duPont, Irene—	
Direct Examination	128
duPont, Pierre S.—	
Direct Examination	150
Cross-Examination	166
Ellis, Ralph T.—	
Direct Examination	171
Fisher, Merrett D.—	
Direct Examination	174

INDEX TO EXHIBITS.

PLAINTIFF'S EXHIBITS.

Ex. No.	Description.	Admitted Page	Printed Page
1.	Memorandum Dated June 23, 1919, P. S. duPont, Chairman of the Board, to Finance Committee.	133	178
2.	Extract From Minutes of Finance Committee Meeting June 25, 1919	135	178
3.	Extract From Minutes of Finance Committee Meeting June 30, 1919	135	Not printed
4.	Extract From Minutes of Finance Committee Meeting August 13, 1919	135	Not printed
5.	Extract From Minutes of Finance Committee Meeting August 27, 1919	135	179
6.	Extract From Minutes of Finance Committee Meeting September 10, 1919	135	Not printed
7.	Extract From Minutes of Finance Committee Meeting September 24, 1919	135	Not printed
8.	Extract From Minutes of Finance Committee Meeting October 8, 1919	135	Not printed
9.	Extract From Minutes of Finance Committee Meeting October 29, 1919	135	Not printed
10.	Memorandum Dated November 11, 1919, From Sub- Committee to Finance Committee	136	180
11.	[No Exhibit.]		
12.	Extract From Minutes of Finance Committee Meeting of November 12, 1919	136	184
13.	Extract From Minutes of Finance Committee Meeting November 26, 1919	136	Not printed
14.	Letter Dated December 3, 1919, From H. Fletcher Brown to Richard V. Lindebury	137	Not printed
15.	Letter December 8, 1919, R. V. Lindebury to H. Fletcher Brown	137	Not printed
16.	Extract From Minutes of Finance Committee Meeting December 10, 1919	137	Not printed

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Description.	Admitted Page	Printed Page
16.	List of Stockholders of E. I. duPont de Nemours and Company Holding 1000 Shares or Over De- cember 31, 1919	141	186
17.	Extract From Minutes of Finance Committee Meet- ing December 15, 1919	144	Not printed
18.	Minutes of Finance Committee Meeting of Decem- ber 16, 1919	145	188
19.	Waiver of Restrictions on Assessment and Collec- tions of Deficiency in Tax	163	Not printed
20.	[No Exhibit.]		
21.	Quotations of Stock of E. I. duPont de Nemours & Company October 1, 1919, to December 31, 1919	171	191

UNITED STATES OF AMERICA, } ss.:
DISTRICT OF DELAWARE, }

BE IT REMEMBERED, that at a District Court of the United States for the District of Delaware, begun and held at the United States Court House and Post Office Building, in the City of Wilmington, in said District of Delaware, among other, the following proceedings were had, to wit:

PIERRE S. DU PONT,
Plaintiff,

v.

WILLARD F. DEPUTY, Collector of
Internal Revenue for the Dis-
trict of Delaware,

Defendant.

No. 2.

September Term, 1936.

DOCKET ENTRIES.

- Sept. 4, 1936. Præcipe filed; same day subpoena issued returnable 2d Tuesday in September, 1936.
- Sept. 5, 1936. Declaration filed.
- Sept. 8, 1936. Marshal returns on summons "Served," &c.; same day writ filed.
- Nov. 18, 1936. Defendant appears by John J. Morris, Jr., Esq., U. S. Attorney; same day præcipe filed.
- Nov. 18, 1936. Rule pleas on or before January 1, 1937. (Exit rule).
- Dec. 11, 1936. Defendant's pleas filed and rule replications on or before December 21, 1936. (Exit rule).

Docket Entries

- Dec. 12, 1936. Reps. and issues filed.
- Dec. 12, 1936. Stipulation that case be tried before the court without a jury, filed.
- Feb. 22, 1937. Certificate of disqualification by Hon. John P. Nields, filed.
- Mar. 22, 1937. Stipulation filed.
- Mar. 22, 1937. Stipulation of facts filed.
- Mar. 22, 1937. Trial.
- Apr. 12, 1937. Plaintiff's requests for findings of fact and conclusions of law, filed.
- May 5, 1937. Motion of plaintiff filed; same day order extending time for filing plaintiff's reply brief until May 15, 1937; same day order filed.
- May 5, 1937. Defendant's requests for findings of fact and conclusions of law, filed.
- May 21, 1937. Motion of plaintiff filed; same day order extending time for filing plaintiff's reply brief until June 1, 1937; same day order filed.
- June 1, 1937. Motion of plaintiff filed; same day order extending time for filing plaintiff's reply brief until June 7, 1937; same day order filed.
- June 9, 1937. Hearing on pleadings and proofs.
- Feb. 21, 1938. Findings of fact, conclusions of law and opinion of court, filed.
- Mar. 22, 1938. Plaintiff's exceptions, filed.
- Apr. 6, 1938. Order overruling plaintiff's exceptions and that judgment be entered for plaintiff.

Judgment.

And now, to wit, this sixth day of April, A. D. 1938, it is considered and adjudged by the court now here that the said Pierre S. du Pont, plaintiff, do have and recover of and from the said Willard F. Deputy, Collector of Internal Revenue for the District of Delaware, defendant, the sum of fifty-four thousand four hundred thirty-nine dollars and fifty-two cents (\$54,439.52) with interest thereon from September 24, A. D. 1935,

Attest:

(Sgd.) H. C. MAHAFFY, JR., Clerk

- Apr. 27, 1938. Petition of plaintiff for appeal with assignments of error, filed; same day order allowing appeal, bond in the sum of \$250.; same day order filed.
- Apr. 27, 1938. Order approving bond of plaintiff on appeal in the sum of \$250, with Great American Indemnity Company as surety; same day bond filed.
- Apr. 27, 1938. Citation issued.
- May 2, 1938. Marshal returns on Citation "Served", &c.; same day writ filed.
- May 19, 1938. Bill of exceptions signed, sealed and filed.
- July 6, 1938. Stipulation for diminuation of record filed.

DECLARATION.

(Filed September 5, 1936.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

PIERRE S. DU PONT,

Plaintiff,

v.

WILLARD F. DEPUTY, Collector of Internal Revenue for the District of Delaware,

Defendant.

No. 2.

September Term,
A. D. 1936.

SUMMONS CASE.

DISTRICT OF DELAWARE, ss:

Willard F. Deputy, Collector of Internal Revenue for the District of Delaware, defendant in the above-entitled cause, was summoned to answer Pierre S. du Pont, plaintiff in the above-entitled cause, of a plea of trespass on the case upon promises and thereupon the said plaintiff by Richards, Layton & Finger, his attorneys, avers that this is an action under Section 3226 of the Revised Statutes of the United States as amended, to recover monies wrongfully collected by the defendant from said plaintiff as income taxes and interest thereon and, so averring, complains:

(1) FOR THAT WHEREAS, heretofore, to-wit, at the time of making the payment to the defendant which is hereinafter mentioned, and at all times subsequent thereto, plaintiff was and is a resident of the state of Delaware, and defendant was and is the Collector of Internal Revenue for the District of Delaware and a resident of the State of Delaware; that this suit is a suit of a civil nature arising under the laws of the United States, to-wit, the Revenue Acts thereof; that in accordance with the requirements of the Act of

Declaration

Congress in that behalf, plaintiff duly filed a return of his income for the year of 1931 with the Collector for the District of Delaware, showing thereon no net taxable income for the year of 1931; that thereafter, in or about the month of September, 1935, the Commissioner of Internal Revenue of the United States determined and assessed against the plaintiff upon account of plaintiff's income for the year of 1931, a deficiency in tax in the amount of \$142,466.79, payment of which, together with interest thereon in the amount of \$29,884.85, defendant demanded of plaintiff; that plaintiff, on or about September 24, 1935, by reason of the assessment and demand aforesaid, and as he was authorized and required by law to do, paid under protest to defendant, the said amounts of \$142,466.79 and \$29,884.85, without, however, in any wise admitting that said amounts, or either of them, were lawfully due as additional income tax, or interest thereon, with respect to his income for the said year, 1931; that on or about March 2, 1936, plaintiff duly filed with defendant a claim for refund of said amounts of \$142,466.79 and \$29,884.85, paid as aforesaid, which amounts are alleged by plaintiff in said claim to be due to him as and for a refund of an overpayment of the amount justly and legally due to defendants as federal income tax upon plaintiff's income for the year 1931, by reason of the refusal of the Commissioner of Internal Revenue to allow a deduction in determining the plaintiff's income tax liability for the year of 1931, the amount paid by the plaintiff in the year of 1931 on account of his liability under a written agreement with Delaware Realty and Investment Company for the use of certain securities borrowed by the plaintiff as hereinafter referred to; . . . that said claim was filed by plaintiff as aforesaid within the statutory period of limitations and according to the provisions of law in that regard, and the Regulations

of the Secretary of the Treasury of the United States established in pursuance thereof; that more than six months has elapsed since the date of filing of such claim for refund as aforesaid without the Commissioner of Internal Revenue having rendered a decision thereon; that defendant has withheld and refused to pay to plaintiff said sums of \$142,466.79 and \$29,884.85, or any part thereof; that the overpayment of tax made by plaintiff as aforesaid, and for which the said claim for refund was filed, and which is set forth in said claim for refund, and which plaintiff seeks to recover in this action arises from the following facts, viz:

In 1919 the plaintiff borrowed certain shares of the capital stock of E. I. du Pont de Nemours Company from Christiana Securities Company. In 1929 the plaintiff borrowed from Delaware Realty and Investment Company, a sufficient number of shares of said stock to satisfy his obligations to Christiana Securities Company. Under a written agreement with Delaware Realty and Investment Company, the plaintiff was required to deposit certain collateral with said Company, and he also became obligated by said written agreement to pay said Company an amount equal to all cash and property dividends declared and paid on said borrowed stock and to reimburse said Company for any lawful tax liability, federal or state, that might accrue against and be paid by said Company on account of the receipt of said payments required to be made by the plaintiff. During the year 1931, plaintiff paid to said Delaware Realty and Investment Company pursuant to such agreement, \$567,648. representing an amount equal to the dividends declared and paid upon said borrowed stock, together with an amount of \$80,063.56 representing an amount equal to the taxes asserted against and paid by said Delaware Realty and Investment Company, on account

Declaration

of the receipt of said payments required to be made by the plaintiff. The Commissioner of Internal Revenue in determining the tax liability of the plaintiff for the year of 1931, and in assessing and collecting the said tax and interest as aforesaid, refused to allow deductions for the above mentioned amounts of \$567,648. and \$80,063.56, a total of \$647,711.56, paid by the plaintiff to the said Delaware Realty and Investment Company. The determination, assessment and collection of said tax and the collection of interest thereon as aforesaid, was contrary to and in violation of, and was not authorized by the laws of the United States, and particularly the Revenue Act of 1928.

That by reason of the facts aforesaid, there was at the time of bringing this suit, and is now due from defendant to plaintiff, the sum of \$172,351.64, with interest thereon from September 24, 1935, at the rate of six per centum (6%) per annum; and being so indebted as aforesaid, defendant in consideration thereof, afterwards, to-wit on the day and year last aforesaid, in the District of Delaware, undertook, and then and there promised plaintiff to pay him the said last mentioned sum of money, with interest as aforesaid, when defendant should be thereunto afterwards requested; that nevertheless, defendant, not regarding his several promises and undertakings, has not yet paid said sum of money, or any part thereof, to plaintiff, although often requested so to do, but hath hitherto wholly neglected and refused, and still does neglect and refuse, to pay the same, or any part thereof; wherefore, the plaintiff saith that he is injured and hath sustained damages in the sum of ~~THREE~~ HUNDRED THOUSAND DOLLARS (\$300,000.) and therefore he brings his suit.

(2) AND FOR THAT WHEREAS, afterwards, to-wit, on the day and year aforesaid, in the District of Delaware, aforesaid, defendant was indebted to the plaintiff in the sum of

Declaration

9

THREE HUNDRED THOUSAND DOLLARS (\$300,000.) for so much money by defendant before that time had and received, to and for the use of plaintiff, and being so indebted, the defendant in consideration thereof as aforesaid, to-wit, on the day and year last aforesaid, in the District of Delaware as aforesaid, undertook and then and there promised the plaintiff to pay him the said last mentioned sum of money, with interest as aforesaid, when defendant should be thereunto afterwards requested; nevertheless, defendant not regarding his said promises and undertaking, hath not yet paid said sum of money, or any part thereof to plaintiff, although often requested so to do, but hath hitherto wholly neglected and refused, and still does neglect and refuse to pay the same; Wherefore, the plaintiff saith that he is injured and hath sustained damages in the amount of THREE HUNDRED THOUSAND DOLLARS (\$300,000.) and therefore he brings his suit.

(Sgd.) RICHARDS, LAYTON & FINGER,
Attorneys for the Plaintiff.

IVINS, PHILLIPS, GRAVES AND BARKER,
Counsel,

Southern Building
Washington, D. C.

BILL OF PARTICULARS.

**WILLARD F. DEPUTY, Collector of
Internal Revenue for the
District of Delaware**

—to—

PIERRE S. DUPONT, Dr.

To amounts illegally collected from Pierre S. duPont as income taxes and interest thereon for the calendar year 1931, as follows:

Amount assessed as additional income tax for the calendar year 1931	\$142,466.79
Amount assessed as interest on said additional income tax	29,884.85

Total

\$172,351.64

Interest on said total from September 24, 1935, on which date payment was made under protest,

\$

[Certain paragraphs and exhibits of the complaint are omitted as irrelevant to the issue on appeal having been disposed of by Stipulation No. 1 filed at the trial.]

DEFENDANT'S PLEAS.

(Filed December 11, 1936.)

Willard F. Deputy, Collector of Internal Revenue for the District of Delaware, the above-named defendant, by John J. Morris, Jr., United States Attorney for the District of Delaware, his attorney, files the following pleas to each of the counts in the plaintiff's declaration filed in this cause:

1. Non Assumpsit.
2. Payment.
3. Release.
4. Statute of Limitations.

(Sgd.) JOHN J. MORRIS, JR.,
*United States Attorney for the
District of Delaware.*

BILL OF EXCEPTIONS.

(Filed May 19, 1938.)

BE IT REMEMBERED that the above entitled case came on for trial at a stated term of the District Court of the United States for the District of Delaware on March 22, 1937, before the Honorable John Biggs, Jr., United States Circuit Judge, assigned to hold the District Court of the United States for the District of Delaware, without a jury, a jury having been duly waived by the parties by a written stipulation.

WHEREUPON the parties offered and introduced the following stipulations, with the exhibits thereto attached, to wit:

STIPULATION.

(Filed March 22, 1937.)

It is hereby stipulated and agreed by and between the parties hereto through their respective attorneys of record as follows:

1. That this stipulation is for the purpose of and applicable to this proceeding only.

2. That this stipulation is intended to effect and constitute a complete settlement and adjustment of all matters and issues set forth in the complaint with the exception of the issue relating to the plaintiff's claim for the allowance of a deduction in computing his Federal income tax for the year 1931 of the amounts alleged in the complaint to have been paid by him to Delaware Realty & Investment Company during the year 1931.

3. That if the Court should determine that the plaintiff in computing taxable net income for the year 1931 is entitled to deduct the payments alleged in the complaint to have been made to Delaware Realty & Investment Company, then the Court may enter judgment for the plaintiff in the sum of \$172,351.64 with interest thereon from September 24, 1935.

4. That if the Court should determine that the plaintiff in computing taxable net income for the year 1931 is not entitled to deduct the payments alleged in the complaint to have been made to Delaware Realty & Investment Company, then, nevertheless, the Court, for the purposes of carrying into effect the terms of this agreed settlement of the other issues set forth in the said complaint, may enter judgment for the plaintiff in the sum of \$54,439.52 with interest thereon from September 24, 1935.

5. That the Court in entering its judgment in this cause may include therein a statement that such judgment, to the extent indicated in this agreement, carries into effect this agreed settlement of all issues other than that relating to

the plaintiff's claim for a deduction of the amounts alleged in the complaint to have been paid to Delaware Realty & Investment Company; and that the Court may further incorporate this stipulation by reference in the terms of its judgment in this cause.

6. That this stipulation is without prejudice to the position which has been or may be taken by either party hereto in pending or future negotiations or litigation with respect to the Federal income tax liability of this plaintiff for any year other than 1931.

7. That this stipulation is not to be construed as an admission by either party of the truth or falsity of any of the allegations of fact set forth in the complaint herein; and that the judgment of the Court in this cause, in so far as it is attributable solely to the terms of this stipulation, shall not be considered as a determination of the truth or falsity of any of the allegations of fact set forth in the complaint.

8. That neither this stipulation, nor the judgment of the Court herein in so far as the same may be based upon this stipulation, may be offered by either party or received in evidence in any case involving the Federal income tax liability of this plaintiff for any year other than 1931.

9. That either party may introduce such legally admissible evidence as may be necessary, advisable and proper with respect to the issue relating to the plaintiff's claim of a deduction for the year 1931 on account of the payments alleged in the complaint to have been made to Delaware Realty & Investment Company; and that in respect to such issue this cause may proceed to final determination as though this stipulation had never been filed.

(Sgd.) RICHARDS, LAYTON & FINGER,
Attorneys for Plaintiff.

(Sgd.) JOHN J. MORRIS, JR.,
Attorney for Defendant.

(Sgd.) LESTER L. GIBSON.

STIPULATION OF FACTS.

(Filed March 22, 1937.)

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys of record, that for the purposes of this proceeding only, the following facts may be taken as true and exhibits referred to herein may be given the same force and effect as if the same had been duly authenticated and offered in open court, subject, however, to the rights of either party to object to any part of the said stipulation or to any of the said exhibits on the ground of irrelevancy or immateriality. It is further agreed that this stipulation is without prejudice to the right of either party to offer at the hearing of this cause other evidence not inconsistent with this stipulation.

I.

Pierre S. du Pont, plaintiff herein, is, and at the time this action was instituted was, a resident of Wilmington, Delaware, and on March 15, 1932, filed his Federal income tax return for the calendar year 1931 with the Collector of Internal Revenue at Wilmington, Delaware. A copy of the said return is hereto attached and made a part hereof, marked Exhibit A.

II.

The defendant, Willard F. Deputy, is, and since September, 1933, has been, the United States Collector of Internal Revenue for the District of Delaware.

III.

In or about the month of September, 1935, the Commissioner of Internal Revenue of the United States determined a deficiency in income tax for the calendar year 1931 in the amount of \$142,466.79, whereupon the plaintiff filed a waiver of his right to appeal to the United States Board of Tax Appeals and consented to the immediate assessment of the

deficiency; the Commissioner then assessed the said deficiency together with interest in the amount of \$29,884.85, all of which the plaintiff paid to the defendant on September 24, 1935, in a total sum of \$172,351.64.

IV.

On March 2, 1936, plaintiff filed with the defendant a claim for refund of the amount of \$142,466.79 and \$29,884.85 paid as aforesaid. A copy of the said claim for refund is attached hereto and made a part hereof, marked Exhibit B.

V.

Pursuant to a resolution duly adopted by the directors of the Christiana Securities Company and recorded amongst the minutes of a special meeting of the Board of Directors of the Christiana Securities Company held at the office of that company on the twelfth day of December, 1919, a copy of which minutes is hereto attached and made a part hereof, marked Exhibit C, on December 23, 1919 the Christiana Securities Company and the plaintiff entered into a written agreement, a copy of which is hereto attached and made a part hereof, marked Exhibit D.

VI.

Attached hereto and made a part hereof, marked Exhibit E, is a copy of the Treasurer's report dated December 11, 1919, and referred to in the aforesaid minutes marked Exhibit C.

VII.

The aforesaid agreement between the plaintiff and the Christiana Securities Company, Exhibit D, was thereafter supplemented by four certain agreements, as follows: An agreement dated January 4, 1923, a copy of which is attached hereto and made a part hereof, marked Exhibit F; an agreement dated August 12, 1925, a copy of which is hereto attached and made a part hereof, marked Exhibit G; an agreement dated October 28, 1926, a copy of which is

Stipulation of Facts

attached hereto and made a part hereof, marked Exhibit H; an agreement dated January 21, 1929, a copy of which is attached hereto and made a part hereof, marked Exhibit I.

VIII.

On December 22, 1919, Irene du Pont, president, made a report to the Finance Committee of the E. I. du Pont de Nemours and Company, of which report a copy is hereto attached and made a part hereof, marked Exhibit J.

IX.

Attached to this stipulation and made a part hereof, marked Exhibit K, is a copy of the minutes of meeting No. 163 (special meeting) of the Finance Committee of the E. I. du Pont de Nemours and Company, duly adopted at a meeting held December 24, 1919.

X.

Pursuant to the resolution of the Finance Committee herein referred to as Exhibit K, the E. I. du Pont de Nemours and Company during the month of December, 1919, entered into two contracts with each of the following-named persons:

Lammot du Pont
F. D. Brown
W. S. Carpenter, Jr.
A. Felix du Pont
J. B. D. Edge

C. A. Meade
C. A. Patterson
W. F. Pickard
W. C. Spruance

the terms of the said contracts, respectively, being the terms of the contracts authorized by the said resolution of the Finance Committee.

XI.

Pursuant to the agreement between the plaintiff and the Christiana Securities Company dated December 23, 1919, a copy of which is hereto annexed, marked Exhibit D, the plaintiff received from the Christiana Securities Com-

pany 9000 shares of common stock of E. I. du Pont de Nemours and Company. Thereafter, in the month of December, 1919, the plaintiff, pursuant to the plan contemplated by the aforesaid contracts, sold and delivered 1000 shares of the common stock of the E. I. du Pont de Nemours and Company so received by him from the Christiana Securities Company to each of the nine following-named persons, who constituted the Executive Committee of the E. I. du Pont de Nemours and Company:

Lamot du Pont
F. D. Brown
W. S. Carpenter, Jr.
A. Felix du Pont
J. B. D. Edge

C. A. Meade
C. A. Patterson
W. F. Pickard
W. C. Spruance

All of these sales were made at a price of \$320.00 per share. Attached hereto and marked Exhibit L is a communication addressed to each of the above named individuals by Irene du Pont, president of said company, to which is attached the computations upon the basis of which plaintiff fixed the price of \$320.00 per share for said stock. At the time these sales were made by the plaintiff, the common stock of the E. I. du Pont de Nemours the Company was not listed on any stock exchange. Such stock was bought and sold by Laird & Company, a local Wilmington, Delaware, brokerage firm. The purchases and sales of such stock by Laird & Company for the period December 1, 1919 to July 2, 1920 are shown in copies of the ledger sheets of that company attached hereto and marked Exhibit M.

XII.

Throughout the month of December, 1919, the plaintiff owned seventy-four shares of the common stock of the E. I. du Pont de Nemours and Company. On November 30, 1918, plaintiff executed a trust instrument for the benefit of Chester County Hospital, a copy of which is attached as Exhibit N. This trust agreement was supplemented by an instrument executed on September 26, 1919, a copy of

which is attached as Exhibit O, and as so supplemented was in effect during the month of December, 1919. On July 29, 1919, plaintiff executed a trust instrument for the benefit of Delaware School Auxiliary Association, a copy of which is attached hereto as Exhibit P. This trust agreement was also in effect during the month of December, 1919. Throughout the month of December, 1919, the authorized common stock of the E. I. du Pont de Nemours and Company was 800,000 shares, of which 588,542 were issued and outstanding.

XIII.

Throughout the month of December, 1919, the plaintiff owned 29,125 shares of the common stock of the Christiana Securities Company and was president and a director of that corporation. The Christiana Securities Company was a Delaware corporation organized during the year 1915, and throughout the month of December, 1919, had, issued and outstanding, 75,000 shares of its common stock. The said 75,000 shares were the total authorized capital stock of the said corporation. The Christiana Securities Company was the owner of 183,000 shares of the common stock of E. I. du Pont de Nemours and Company immediately previous to the loan of 9,000 shares to the plaintiff on December 23, 1919.

XIV.

On March 10, 1921, Irene du Pont wrote and mailed or delivered a letter to the plaintiff, a copy of which is attached as Exhibit Q. On April 1, 1921, the plaintiff wrote and mailed separate letters to Lamot du Pont, F. D. Brown, W. S. Carpenter, Jr., A. Felix du Pont, J. B. D. Edge, C. A. Meade, C. A. Patterson, W. F. Pickard and W. C. Spruance, respectively. A copy of the letter so written and mailed to W. S. Carpenter, Jr., is hereto attached and made a part hereof, marked Exhibit R. The letters written and mailed to the other persons named were identical except for the addressees' names and addresses. These letters were duly received by the respective ad-

dressées. The proposals therein made were accepted by the respective persons addressed and the shares of Christiana Securities Company stock were delivered in accordance with the terms of the agreements so made.

XV.

On October 25, 1929, the plaintiff entered into an agreement with the Delaware Realty and Investment Company, a corporation, a copy of which agreement is attached hereto and made a part hereof, marked Exhibit S. The 142,212 shares of E. I. du Pont de Nemours and Company stock mentioned in the said agreement were received by the said plaintiff pursuant to the said contract, and were by him delivered to the Christiana Securities Company.

XVI.

During the year 1929 the plaintiff returned 300 shares of the common stock of E. I. du Pont de Nemours and Company to the Delaware Realty and Investment Company, thus reducing his obligation to that company to 141,912 shares. During the year 1931 the E. I. du Pont de Nemours and Company paid dividends on its common stock amounting to \$4.00 per share and in accordance with the agreement with the Delaware Realty and Investment Company dated October 25, 1929 (Exhibit S), the plaintiff paid to the said company a sum of \$567,648.00, which was an amount equal to the dividends declared and paid upon the stock borrowed under said agreement and not returned.

XVII.

During the calendar year 1931 the plaintiff paid to the Delaware Realty and Investment Company, in accordance with the terms of his agreement with said company dated October 25, 1929 (Exhibit S), the amount of \$80,063.56, being an amount equal to Federal income taxes asserted against and paid by the said Delaware Realty and Investment Company for the calendar year 1930 on account of the receipt by the Delaware Realty and Investment Company

from the plaintiff in that year of payments made by the plaintiff under said agreement of October 25, 1929 (Exhibit S). In 1933 the Commissioner of Internal Revenue determined that said \$80,063.56 paid by plaintiff to the Delaware Realty and Investment Company in 1931 was income to said company in that year, and that an additional tax was due thereon. The plaintiff was called upon to and did in 1933 reimburse said company on account of said additional tax in the amount of \$9,607.98 together with interest thereon in the amount of \$663.98, a total of \$10,271.60.

XVIII.

On his return for the calendar year 1931 (Exhibit A) the plaintiff claimed and took as a deduction from gross income on line 13, under the heading "Interest Paid", the sum of \$567,648, being the sum mentioned in paragraph XVI of this Stipulation. The said plaintiff did not claim or take as a deduction from gross income on his said return the sum of \$80,063.56, being the amount mentioned in paragraph XVII of this stipulation. The Commissioner of Internal Revenue in determining the tax liability of the plaintiff for the calendar year 1931 and in assessing and collecting the deficiency in tax of \$142,466.79 and interest thereon of \$29,884.85, refused to allow as deductions the above-mentioned amounts of \$567,648.00 and \$80,063.56, a total of \$647,711.56, paid by the plaintiff to the Delaware Realty and Investment Company.

XIX.

The plaintiff made his return and kept his books for the calendar year 1931 on a cash receipts and disbursements basis.

(Sgd.) RICHARDS, LAYTON & FINGER

(Sgd.) JAMES S. Y. IVINS,

Attorneys for Plaintiff.

(Sgd.) JOHN J. MORRIS, JR.

(Sgd.) LESTER L. GIBSON

Attorneys for Defendant.

Computation of credit

THREE MONTHS

CONFERENCE PROVISION

8700 INCOME TAX UNIT

REV ACT

ANNESTMENT

142,466.79

29,884.85

172,351.64

11-12

C. P. L. d.

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, SERVICE, OR SALE OF PROPERTY

For Calendar Year 1931

File This Return With the Collector of Internal Revenue for Your District on or Before March 15, 1932

PRINT NAME AND ADDRESS PLAINLY BELOW

Pierre S. du Pont

9012 duPont Building

23 Wilmington

New Castle

Delaware

DISTRICT OF C

Ch. Ch. H. G. Sec. of Ind. Fin. Payment

- Are you a citizen or resident of the United States? **Yes**
- If you filed a return for 1930, what Collector's office was it sent to? **Wilmington, Del.**
- Is there a return of husband and wife? **No**
- State name of husband or wife if a separate return was made and the Collector's office where it was sent. **Alice Belin duPont, Wilmington, Del.**

- Were you married and living with husband or wife on the last day of your taxable year? **Yes**
- If not, were you on the last day of your taxable year supporting in your household one or more persons closely related to you? **Yes**
- If your status in respect to questions 3 and 4 changed during the year, state date and nature of change. **No**
- How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support were receiving their chief support from you on the last day of your taxable year? **None**

INCOME		Amount received	Amount paid (Schedule B)
1. Salaries, Wages, Commissions, etc. (State name and address of employer)			20,640.78
2. Income from Business or Profession. (From Schedule A)			
3. Interest on Bank Deposits, Notes, Corporation Bonds, etc. (except interest on tax-free covenant bonds)			336,748.05
4. Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source			
5. Income from Partnerships. (State name and address)			
6. Income from Fiduciaries. (State name and address)			
7. Rents and Royalties. (From Schedule B)			4,876.00
8. Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			1950,782.21
9. Taxable Interest on Liberty Bonds, etc. (From Schedule D)			
10. Dividends on Stock of Domestic Corporations			1,475,046.54
11. Other Income (including dividends on stock of foreign corporations). (State name of income)			

No further action necessary by Oil & Gas Division
Do Not Withdraw Return

4-8

75.06

J. M. C. E.

REC'D

MAR 15

6. Income from Fiduciaries. (State name and address)

7. Rents and Royalties. (See Schedule B)

8. Federal Income Tax of Trust Estate, Estate, Bank, etc. (See Schedule C)

9. Taxable Interest in Liberty Bonds, etc. (See Schedule D)

10. Dividends on Stock in Domestic Corporations

11. Other Income (including dividends on stock of foreign corporations). (See Schedule E)

(a)

(b)

12. TOTAL INCOME IN ITEMS 1 TO 11

DEDUCTIONS

13. Interest Paid

1. Taxes Paid. (Explain in Schedule F)

Losses by Fire, Storm, etc. (Explain in Table at end of page 2)

Bad Debts. (Explain in Schedule F)

Contributions. (Explain in Schedule F)

Other Deductions Authorized by Law. (Explain in Schedule F)

TOTAL DEDUCTIONS IN ITEMS 13 TO 18

Net Income (Item 12 minus Item 19)

EARNED INCOME CREDIT

COMPUTATION OF TAX (See Instruction 22)

Net Income (not over \$20,000)	1	22. Net Income (Item 20 above)	18,330.31	44. Normal Tax (13 1/2% of Item 43)	
Personal Exemption and credit for Dependents		23. Liberty Bond Interest (Item 9)	2,506.52	45. Normal Tax (5% of Item 43)	
Less (Item 21 minus 22)		24. Dividends (Item 10)		46. Normal Tax (5% of Item 43)	
Not taxable at 13 1/2% (not over \$20,000)		25. Credit for Dependents		47. Surplus on Item 20 (see Instruction 22)	9,791.35
Not taxable at 5% (not over \$20,000)		26. Personal Exemption		48. Tax on Net Income (total of Items 44 to 47)	
20. Amount taxable at 5% (balance over \$20,000 of Item 23)		27. Total of Items 24 to 27	4,204.65	49. Tax on Capital Gains or Loss (13 1/2% of Col. 2, Sched. D)	14,178.63
27. Normal Tax (13 1/2% of Item 24)		28. Balance (Item 28 minus 29)	0.00	50. Total of or difference between Items 48 and 49	0.00
28. Normal Tax (5% of Item 25)		29. Amount taxable at 13 1/2% (not over \$4,000)		51. Less Credit of 20% of Tax on Earned Income (Item 22)	0.00
29. Normal Tax (5% of Item 26)		30. Balance (Item 30 minus 31)		52. Total Tax (Item 50 minus 51)	0.00
30. Surplus on Item 21		31. Amount taxable at 5% (not over \$4,000)		53. Less Income Tax Paid at Source	
31. Tax on Earned Net Income (total of Items 27 to 30)		32. Amount taxable at 5% (Item 41 minus 42)		54. Income Tax paid to a foreign country or U. S. possession	
32. Credit of 20% of Tax (not over 25% of Items 20, 44, 45, and 46)				55. Balance of Tax (Item 52 minus Items 53 and 54)	0.00

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief, is a true and complete return made in good faith for the taxable year stated, pursuant to the Revenue Act of 1926 and the Regulations issued thereunder.

See Instruction 27

Sworn to and submitted before me this 1st day of March, 1927

NOTARIAL SEAL

An amended return must be marked "Amended" at top of return

Checks and drafts will be accepted only if payable to pay

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instructions 2)

1. Total receipts from business or profession (state kind of business)			
Cost or Goods Sold		Other Business Deductions	
2. Labor		10. Salaries not included as "Labor" in Line 2. (Do not deduct compensation for your services)	
3. Material and supplies		11. Interest on business indebtedness to others	
4. Merchandise bought for sale		12. Taxes on business and business property	
5. Other costs (Items below or on separate sheet)		13. Losses (explain in table at foot of page)	
6. Plus inventory at beginning of year		14. Bad debts arising from sales or services	
7. TOTAL (Lines 2 to 6)		15. Depreciation, obsolescence, and depletion (explain in table provided at foot of page)	
8. Less inventory at end of year		16. Repairs, renewals, and other expenses (explain below or on separate sheet)	
9. Net Cost or Goods Sold (Line 7 minus Line 8)		17. TOTAL (Lines 10 to 16)	
		18. TOTAL DEDUCTIONS (Line 9 plus Line 17)	
		19. Net Income (Line 1 minus Line 18) (Enter on Form 10)	

Enter "C," "O" or "M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market, whichever is lower.

Explanation of deductions claimed on Lines 5 and 16.

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 7)

1. Kind of Property	2. Amount Received	3. Cost or Value as or March 1, 1913, if owned by decedent	4. Depreciation (explain in table at foot of page)	5. Net Income	6. Other Deductions (explain below)	7. Net Profit (Enter on Form 10)

Explanation of deductions claimed in Column 6.

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Allowance from Acquisitions	5. Cost or Value as or March 1, 1913, if owned by decedent	6. Deductions (explain below)	7. Net Profit (Enter on Form 10)

See how property was acquired.

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instructions 9)

1. Character of Securities	2. Interest Received or Accrued	3. Amount Owed	4. Face Value	5. Coupon or Dividend Rate	6. Maturity or Redemption Date	7. Name of Issuer
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia						
(b) Securities issued under Federal Farm Loan Act, or under such Act as amended, Treasury Bills, and Treasury Certificates of Indebtedness						
Liberty 3½% Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U. S. possessions						
Liberty 4% and 4½% Bonds, Treasury Bonds, and Treasury Savings Certificates						
(c) Treasury Notes						

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

1. Kind of Property	2. Date Acquired	3. Amount Realized	4. Available Excess Exclusion	5. or Marital Deduction Exclusion	6. Excess Exclusion	7. Tax Paid on Gain

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES See Instructions.

1. OBLIGATIONS OR SECURITIES	2. INTEREST RECEIVED OR ANTICIPATED	3. AMOUNT OWNED	4. TYPE OF SECURITY	5. NUMBER OF SHARES OR BONDS	6. VALUE OF SHARES OR BONDS	7. VALUE OF INTEREST RECEIVED OR ANTICIPATED
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia			AN	XXXXXX	XX	XXXXXX
(b) Securities issued under Federal Farm Loan Act, or under such Act as amended, Treasury Bills, and Treasury Certificates of Indebtedness			AN	XXXXXX	XX	XXXXXX
Liberty 3 1/4 % Bonds and other obligations of United States issued on or before September 1, 1917, and obligations of U.S. possessions			AN	XXXXXX	XX	XXXXXX
Liberty 4 % and 4 1/4 % Bonds, Treasury Bonds, and Treasury Savings Certificates			\$5,000			
(c) Treasury Notes			None			

SCHEDULE F—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 2, 14, 16, 17, AND 18**EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND E**

1. KIND OF PROPERTY (If buildings, state material of which constructed)	2. DATE ACQUIRED	3. AGE WHEN ACQUIRED	4. PROBABLE LIFE AFTER ACQUISITION	5. COST OR VALUE AS OF MARCH 1, 1913, Whichever Greater (Include value of Land)	AMOUNT OF DEPRECIATION CHARGES ON	
					6. Previous years	7. This year

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 26

[illegible]

Year 1931

PROFIT & LOSS - SECURITY TRANSACTIONS

Schedule c-8

	<u>Date</u> <u>Acquired</u>	<u>Cost</u>	<u>Proceeds</u>	<u>Profit</u> <u>and Loss</u>
2,300 Warner Bros. 1000 -6/17/30 Pic. Inc.....1000 -8/27/30 300 -9/30/30		\$77,374.50	\$ 44,045.50	\$ 33,329.00
5,500 Checker Cab Mfg. Company..... 5/6/31		55,000.00 ✓	54,312.50 ✓	687.50
20,000 Warner Bros. Pic. Inc..... 1/27/30		1,010,000.00	384,287.50	625,712.50
3,150 United State Rub. Co. Pfd..... 11/14/29 6/23/31		98,951.25	40,430.25	58,521.00
6,250 Sims Petroleum Co. 10/24/30		153,123.75	37,500.00	115,623.75
1,400 Baltimore & Ohio Railroad Company 6/17/30		138,202.00	20,397.13	117,804.87
101 General Motors Corp Common..... 6/30/31		3,314.82	2,323.00	991.82
88 Christiansa Securities Co., Preferred.. 10/2/31		10,208.00	9,680.80	527.20
441 General Motors Corp Common- Short 3/19/30 2/11/31		19,034.28	19,616.84	582.56
13,615 Corden Oil Company 5/6/31		13,615.00 ✓	15,316.27 ✓	1,701.27
500 Warner Bros. Pic Inc 5/6/31		4,000.00 ✓	4,125.00	125.00
		<u>\$ 1,582,823.60</u>	<u>\$632,035.39</u>	<u>\$ 950,788.21</u>

FEDERALTAXES

14 - F

Customs Duties.....	\$ 600.91
Stock Transfers.....	2,427.46
State of Delaware.....	56,752.92
Real Estate.....	<u>33,348.37</u> ✓
Total.....	\$93,129.66

OTHER DEDUCTIONS

18-1

FARM OPERATIONSEarningsExpensesNet

Fields.....	\$ 7,522.42	\$ 13,729.57	\$ 6,200.15
Livestock.....	37,298.90	35,874.96	1,423.94
Orchards.....	2,206.88	2,798.55	591.67
Vegetable Gardens.....	46.70	27.72	18.98
Sales of Products.....	---	1,286.19	1,286.19
Totals.....	\$ 47,081.90	\$ 53,716.99	\$ 6,635.09 (Lost)

OTHER FARM OPERATIONS..... \$ 23,251.17 ?

Total Farm Expenses.....	\$ 76,968.16
Less: Gross Earnings.....	47,081.90

Total Loss.....	\$ 29,886.26
Less: 20% Personal Farm Expenses.....	6,547.76

TOTAL LOSS..... \$ 29,031.50

TENANT HOUSES EXPENSES..... 9,616.05WASHINGTON STATE PROPERTY EXPENSES..... 3,671.34GENERAL OFFICE EXPENSES:

Salaries.....	\$ 10,682.17	
Office Expenses.....	2,033.09	
Stationery.....	734.77	
Postage.....	481.31	
Discount on Invoices.....	870.25	
	13,061.09	3,265.25 ^{21.}

MAINTENANCE EXPENSES..... 39,341.93 7,668.38^{21.}ROADS..... 2,786.60^{21.}

Total..... \$ 56,239.21 ✓

OTHER DEDUCTIONS

18-F

SALARY & ADMINISTRATIVE

Hotels, Clubs & Restaurants.....	\$ 1,413.64
Legal, Auditing & Accounting.....	9,005.98
Miscellaneous Office Expenses.....	3,498.00
Salaries - Wilmington Office.....	11,959.45
Salaries - New York Office.....	537.60
Apartment - New York.....	2,520.00 - 11.22
Office Rent - New York.....	2,576.00
Office Rent - Wilmington.....	<u>4,800.00</u>
Total.....	\$ 36,310.67

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ REFUND OF TAX ILLEGALLY COLLECTED.
☐ REFUND OF AMOUNT PAID FOR STAMPS UNPAID, OR USED IN ERROR OF EXCH.
☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

COLLECTOR'S STAMP
 (Date received)
 RECEIVED
 MAR 5 1936
 DISTRICT OF DELAWARE

RECEIVED
 MAR 5 1936
 CLAY'S CONTROL
 SECTION

STATE OF Delaware
 COUNTY OF New Castle

Name of taxpayer or purchaser of stamps Pierre S. du Pont
 Business address du Pont Building, Wilmington, Delaware
 Residence _____

TYPE
 OR
 PRINT

- The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:
1. District in which return (if any) was filed Delaware
 2. Period (if for income tax, make separate form for each taxable year) from January 1, 1931 to December 31, 1931.
 3. Character of assessment or tax Income tax
 4. Amount of assessment, \$142,466.79 tax \$29,884.85 interest \$172,351.64 September 24, 1935.
 5. Date stamps were purchased from the Government _____
 6. Amount to be refunded Interest of \$29,884.85 and tax of \$172,351.64
 7. Amount to be abated (not applicable to income or estate taxes) _____
 8. The time within which this claim may be legally filed expires, under Section _____ of the Revenue Act of 19 _____

The deponent verily believes that this claim should be allowed for the following reasons:

See annexed sheets numbered
 one to eight.

BUREAU OF
 INTERNAL REVENUE
 MAIL ROOM
 1935 MAR 5 AM 9 12

Subscribed and sworn to before me this 27th day of February, 1936.
J. H. Bassard Notary Public
 (Signature of Notary Public)
 (Signature of Taxpayer) P. S. du Pont

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4

Claim No.

Total

Shirley D. Jones
Collector of Internal Revenue

Amount rejected. . . \$..... (13)

1

- 2.2. EXPERIMENTAL MATERIALS AND METHODS**

In his determination of the taxable income of the deponent, as set out in Bureau letter dated September 11, 1935, the Commissioner committed the errors set out below.

I. The Commissioner incorrectly determined the loss sustained by deponent upon the sale of 20,000 shares of the stock of Warner Brothers Pictures.

(a) The Commissioner incorrectly determined the cost of such stock to be \$798,285.

On February 24, 1931, deponent sold short 20,000 shares of the common stock of Warner Brothers Pictures for \$384,287.50. On June 9, 1931 this sale was covered by the delivery of 20,000 shares of such stock acquired by deponent under the following circumstances:

On January 27, 1930, deponent purchased 40,000 shares of the stock of Warner Brothers Pictures at a cost of \$2,020,000. On April 2, 1930 deponent transferred such stock, together with other securities, to H. Rodney Sharp as trustee, to be held by him under the terms of a declaration of trust executed by him on the same date, a copy of which is hereto annexed, marked Exhibit A. A copy of the certificate of incorporation of Welfare Foundation, Inc., the beneficiary of such trust, is hereto annexed, marked Exhibit B.

Upon the creation of said trust, the beneficiary thereof entered into contracts to construct public schools, basing its commitments upon an estimate of the income to be received from said trust. Shortly thereafter, due to economic conditions, the income from the trust securities decreased in amount, and it soon became evident that the beneficiary of the trust would be financially embarrassed and unable to meet commitments made in connection with public school construction work unless the situation were relieved to some extent.

Upon being advised of the situation of the beneficiary, deponent voluntarily offered to augment the trust income by transferring thereto additional securities. Deponent discussed the matter with the trustee and, after some consideration, finally decided to transfer to the trust five thousand shares of the capital stock of Atlantic Refining Company. Deponent therefore advised the trustee to this effect and directed his secretary to make the necessary transfer, which was done in June of 1931. In June, 1931 the trustee retransferred to deponent discharged from the trust the 40,000 shares of the capital stock of Warner Brothers Pictures, Inc., upon which dividends had ceased.

Twenty thousand shares of the stock of Warner Brothers Pictures, Inc., so returned to the deponent by the trustee, were delivered by deponent to his broker to cover the short sale of February 24, 1931. Said stock had cost deponent \$1,010,000 and upon his tax return deponent claimed a deduction of \$625,712.50, representing the difference between said cost and the selling price thereof, viz., \$384,287.50.

In letter dated September 11, 1935, the Commissioner of Internal Revenue determined the cost basis of such 20,000 shares of Warner Brothers Pictures, Inc., so sold by deponent as aforesaid, to be \$798,285. In refusing to recognize the correct cost of \$1,010,000 the Commissioner committed error.

(b) The Commissioner incorrectly determined that 4/5ths of the loss on the sale of Warner Brothers Pictures represented a loss sustained on the sale of securities held for a period in excess of two years and was to be accounted for as a capital loss.

The error on the part of the Commissioner as set out in his letter of September 11, 1935, seems to arise from a confusion of Warner Brothers Pictures stock with Atlantic Refining Company stock. Four-fifths of

the Atlantic Refining Company stock was held for over two years, but that fact would not have any effect upon the gain or loss from the sale or exchange of the stock of Warner Brothers Pictures, Inc.

The Commissioner determined the cost of Warner Brothers Pictures stock to be \$798,285 upon the following basis: The market value of 5,000 shares of stock of Atlantic Refining Company delivered to H. Rodney Sharp, as trustee, was \$61,875 at the time of such delivery. The fair market value of 9,610 shares of Warner Brothers Pictures stock on the same day was \$61,875. The Commissioner determined that 5,000 shares of stock of Atlantic Refining Company stock were exchanged for 9,610 shares of the stock of Warner Brothers Pictures, and that 30,390 shares of the stock of Warner Brothers Pictures were received from the trustee without consideration, either as a partial termination of the trust and a surrender *pro tanto* of the corpus or as a gift. On that basis the Commissioner determined that the cost to deponent of the 40,000 shares of stock of Warner Brothers Pictures received from the trustee was as follows:

9610 shares received upon an exchange	\$61,875
30,390 shares received without consideration	\$1,534,675
Cost basis, 40,000 shares	\$1,596,570

The Commissioner therefore determined the cost basis of 20,000 shares of such stock as \$798,285, the sales price to be \$384,287.50, and the loss to be \$413,997.50. Deponent does not agree with this computation of loss, contending that no exchange was involved and that the cost was \$1,010,000 as set out in (a) above.

Whether or not the Commissioner has correctly determined the cost basis of such stock, all of such stock was held for less than two years.

Stipulation of Facts

II. The Commissioner erroneously failed to allow an loss upon the disposition of 5,000 shares of stock of Atlantic Refining Company.

It is the position of the deponent, as set out in (a) above, that 20,000 shares of the stock of Warner Brothers Pictures was returned to him without consideration and that 5,000 shares of Atlantic Refining Company stock was delivered to H. Rodney Sharp as trustee without consideration. The Commissioner, however, has determined that 5,000 shares of stock of Atlantic Refining Company was exchanged for 9,610 shares of stock of Warner Brothers Pictures. If the Commissioner's position is correct, gain or loss was realized upon this disposition of the stock of Atlantic Refining Company as follows:

1,000 shares of Atlantic Refining Co.
held less than two years:

Amount received, 1/5th of \$61,850
Cost

\$12,375
39,150

Ordinary loss

\$26,775

4,000 shares of Atlantic Refining Co.
held more than two years:

Amount received, 4/5ths of \$61,850
Cost

\$49,480.00
\$211,394.30

Capital net loss

\$161,914.30

Giving effect to the basis used by the Commissioner in determining that there was an exchange of 5,000 shares of Atlantic Refining Co. for 9,610 shares of Warner Brothers Pictures, (a) and (b) above, and without giving effect to any other grounds urged by the deponent, the computation of tax liability would be as follows:

Stipulation of Facts

37

Ordinary net income, office letter dated
September 11, 1935

\$1,049,681.72

Add:

Contributions adjustment

28,303.55

\$1,077,985.27

Less:

Ordinary loss on sale
of Warner Brothers
Pictures, erroneously
treated as capital loss \$331,198.00

Ordinary loss on sale
of 1,000 Atlantic Re-
fining Company 26,776.00

357,974.00

Ordinary net income, revised

\$720,011.27

Capital net loss, office letter dated
September 11, 1935

\$444,628.63

Less:

Ordinary loss erroneously allowed as
capital loss

331,198.00

\$113,430.63

Add:

4,000 Atlantic Refining Co. sold at
capital loss of

161,914.34

Capital net loss, revised

\$275,344.97

Ordinary net income

\$720,011.27

Less:

Dividends

\$1,449,288.67

Subject to normal tax

None

Surtax on \$720,011.27

\$135,662.25

Less:

12½% of capital net loss of
\$275,344.97

34,418.12

\$101,244.13

Less:

Earned Income Credit \$10.97

Income tax paid at source \$3,540.00

3,550.97

Adjusted tax

\$97,693.14

The computation of tax of \$142,466.79 set out in the Bureau letter of September 11, 1935 represented an erroneous computation. The correct computation giving effect to the adjustments in income in accordance with the ruling made by the Commissioner is as set out above.

III. In computing taxable income the Commissioner of Internal Revenue erroneously failed to allow a deduction of \$647,711.56 paid by deponent to Delaware Realty and Investment Company upon account of stock borrowed from that company.

Prior to the year 1931 deponent borrowed certain shares of stock of E. I. du Pont de Nemours & Company from Delaware Realty and Investment Company. Deponent agreed with the lender that he would pay to it the dividends declared and paid on the borrowed stock, together with any taxes which might be asserted against the Delaware Realty and Investment Company upon account of the receipt of such payments. During the year 1931 deponent paid to Delaware Realty and Investment Company, pursuant to such agreement, \$567,648.00 representing an amount equal to the dividends declared and paid upon the borrowed stock, together with an amount of \$80,063.56 representing an amount equal to the taxes asserted against Delaware Realty and Investment Company upon account of the receipt of the amount equal to such dividends. In the computation of the taxable net income of deponent, as set out in Bureau letter of September 11, 1935, and upon which tax of \$142,466.79 was assessed, no deduction was allowed by the Commissioner of Internal Revenue upon account of such payments to Delaware Realty and Investment Company. The amounts so paid to Delaware Realty and Investment Company were properly deductible from the gross income of the deponent.

IV. The Commissioner erroneously determined a taxable gain realized upon the sale of 6,250 shares of Simms Petroleum Company stock.

In 1930 deponent received from a syndicate of which he had been a member 50,000 shares of the stock of Simms

Petroleum Company. In 1931 deponent sold 6,250 shares of such stock. Upon his income tax return deponent showed the cost of such 6,250 shares of stock to be \$153,123.75. By Bureau letter dated October 4, 1934, this cost was increased by \$24,754.62. No further adjustment was made in Bureau letter of September 11, 1935 upon the basis of which the tax here in controversy was assessed. Subsequent to the issue of Bureau letter of September 11, 1935, the Commissioner of Internal Revenue, in a proceeding with respect to the 1929 tax liability of deponent pending before the United States Board of Tax Appeals, asserted a liability against deponent from the operation of the syndicate which, if correct, increases the cost base of the stock sold in 1931 to \$237,549.40. Deponent asserts that if the position of the Commissioner in the 1929 proceeding should be sustained deponent is entitled to an increased base for computation of the loss sustained upon the disposition of such stock and to a reduction accordingly in his taxable income and tax.

V. Deponent claims the benefit of any and all further adjustments in income for 1931 which may result from any changes or amendments in his income or tax liability for prior years, either as the result of any determination by the Commissioner of Internal Revenue, the Board of Tax Appeals, or the courts.

VI. If the position taken by the Commissioner in said 1929 proceeding, with respect to the losses claimed by deponent for the year 1929, is sustained, then deponent sustained a net loss in the year 1930 in his business of trading in securities in excess of \$600,000, no part of which said net loss has been allowed by the Commissioner in computing deponent's taxable net income for 1931.

EXHIBIT "A."

**CERTIFIED COPY OF
DEED OF TRUST, DATED APRIL 2, 1930**

Between

H. RODNEY SHARP, TRUSTEE

and

PIERRE S. DU PONT

WHEREAS, PIERRE S. DU PONT, of the City of Wilmington and State of Delaware, desires to provide WELFARE FOUNDATION, INCORPORATED, a corporation of the State of Delaware, with funds to enable it to assist in the erection and to aid and assist in the construction and operation of schools, hospitals, charitable, scientific and religious organizations, and playgrounds, and in the equipment and improvements incident thereto in the forty-eight (48) States and Territories of the United States of America, and the political subdivisions thereof:

AND WHEREAS, the undersigned, H. Rodney Sharp, of the City of Wilmington and State of Delaware, has this day received from said Pierre S. du Pont the following described securities, namely:

10,000 shares Anaconda Copper Mining Company, Capital Stock

10,000 shares Baltimore & Ohio Railroad Company, Common Stock

25,000 shares Kennecott Copper Corporation, Capital Stock

40,000 shares Warner Brothers Pictures Incorporated, Class "A", Common Stock

50,000 shares General Motors Corporation, Common Stock

AND WHEREAS, said H. Rodney Sharp at the instance and request of said Pierre S. du Pont has consented to act as Trustee of said shares of stock:

THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I, Rodney Sharp, in consideration of the premises, hereby acknowledge and declare that I am possessed of and shall hold said shares of corporate stocks hereinabove particularly listed, and other securities that may be substituted for said shares of stock as hereinafter provided, and all dividends accrued and to accrue upon the same, IN TRUST, for the following uses, intents and purposes: that is to say:

IN TRUST to collect and receive the dividends accrued and to accrue upon said shares of stock and to pay over said dividends, as and when received, to the amount of One Million, Five Hundred Thousand Dollars (\$1,500,000.00) to Welfare Foundation, Inc., a corporation of the State of Delaware, having its principal office at 9012 du Pont Building, Wilmington, Delaware, (except stock dividends, which shall be deemed a part of the principal of said trust funds); and thereupon, IN FURTHER TRUST, to assign, transfer and deliver to said Pierre S. du Pont, or to his executors, the securities, shares of stock, dividends, profits and sums of money remaining in my hands as such Trustee.

It is hereby expressly understood and provided that I am empowered to exchange said shares of stock hereinabove listed for other securities of a like character, or to sell the same and reinvest the proceeds in other securities, such reinvestment to be subject to all the terms and conditions of this trust, or to borrow money for the objects of this trust and in so doing to pledge said shares of stock as collateral security or such part thereof as may be necessary.

It is hereby further understood and provided that, in the event of my death, disability or refusal to act during the execution of this trust, Frank A. McHugh, of the City of Wilmington and State of Delaware shall assume the trusteeship in my place, with all the powers and subject to all the limitations of this trust; and in the event of the death, disability or refusal to act of the said Frank A. McHugh during the execution of this trust, Henry B. Robertson of the City of Wilmington and State of Delaware shall assume

the trusteeship in his place, with all the powers and subject to all the limitations of this trust.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this second day of April 1930.

Signed and sealed in
the presence of

Anna M. Baird

(H. Rodney Sharp) (SEAL)

STATE OF DELAWARE }
NEW CASTLE COUNTY } ss.

BE IT REMEMBERED, That on this 7th day of April 1930, personally came before the subscriber, a Notary Public for the State of Delaware, H. Rodney Sharp, party of this Declaration of Trust, known to me personally to be such and acknowledged the same to be his declaration.

GIVEN under my hand and seal of office, the day and year aforesaid.

(s) J. H. Cassidy
Notary Public

I certify that the foregoing is a true and correct copy of the original Deed of Trust, dated April 2nd, 1930.

J H CASSIDY
Notary Public

EXHIBIT "B."

CERTIFICATE OF INCORPORATION

OF

WELFARE FOUNDATION INCORPORATED

FIRST. The name of this corporation is "Welfare Foundation, Incorporated."

SECOND. Its principal office in the State of Delaware is to be located in the duPont Building at Tenth and Market Streets, in the City of Wilmington, and the name and address of its resident agent is Frank A. McHugh, 9012 du Pont Building, Wilmington, Del.

THIRD. The nature of the business, and the objects and purposes proposed to be transacted, promoted and carried out, are to do any or all of the things herein mentioned, as fully and to the same extent as natural persons might or could do, viz:

To contribute toward the erection and to aid and assist in the construction and operation of schools, hospitals, charitable, scientific and religious organizations, and playgrounds, and in the equipment and improvements incident thereto in the forty-eight (48) states and territories of the United States of America, and the political sub-divisions thereof.

To join with others in a contract or contracts for the construction, equipment and furnishing, and operation of schools, hospitals, charitable, scientific and religious organizations and playgrounds, whereby the corporation shall undertake and become bound to pay and thereafter shall pay a certain fixed part of the money agreed to be paid under said contract or contracts.

To acquire, hold, purchase, pay for, maintain, operate and endow schools, hospitals, charitable, scientific and religious organizations and playgrounds.

To purchase, lease, exchange or otherwise acquire any lands and buildings in the various States and political sub-

divisions thereof and any estate or interest in any rights connected with any such lands and buildings.

To acquire by gift, subscription or otherwise and to purchase, hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of shares of capital stock, bonds, or other securities issued by any other corporation or corporations, association or associations; and while the owner of such shares of stock to exercise all the rights, powers and privileges of ownership, including the right to vote thereon.

To contract for and erect buildings and construct roads of every description.

To enter into, make, perform and carry out contracts of every sort and kind with any person, firm, association, corporation, private, public or municipal or a body politic.

To conduct its business in other States and to have one or more offices out of this State and to hold, purchase, mortgage and convey real and personal property out of this State.

FOURTH. The corporation shall have no capital stock. The members shall be the incorporators hereof and the persons named by them or by the survivor or survivors of them as their successors.

FIFTH. The name and place of residence of each of the incorporators are as follows:—

NAME	RESIDENCE
Henry Belin du Pont	Wilmington, Delaware
J. Simpson Dean,	Wilmington, Delaware.
Frank A. McHugh	Wilmington, Delaware.

SIXTH. The existence of this corporation is to be perpetual.

SEVENTH. The private property of the trustees shall not be subject to the payment of corporate debts.

EIGHTH. The direction and management of the affairs of the corporation, and the control and disposition of the property and funds, shall be vested in a board of trustees,

three in number, to be composed of the following individuals:

Henry Belin du Pont,
J. Simpson Dean,
Frank A. McHugh.

Vacancies occurring by death, resignations or otherwise shall be filled by the remaining trustees in such manner as the by-laws shall prescribe.

NINTH. The said trustees shall be entitled to take hold and administer any funds or property which may be transferred to the corporation for the purposes and objects hereinbefore enumerated; with full power to adopt a common seal, to appoint officers, whether members of the board of trustees or otherwise, and such employees as may be deemed necessary in carrying on the business of the corporation with full power to adopt by-laws and such rules and regulations as may be necessary to secure the safe and convenient transaction of the business of the corporation; with full power and discretion to deal with and expend any and all funds of the corporation in such manner as in their judgment will best promote the objects hereinbefore set forth; and to have and use all the powers and authority necessary to promote the objects and carry out the purposes hereinbefore set forth.

TENTH. That the said corporation may take and hold any additional donations, grants, devises, or bequests which may be made in the further support of the purposes of the said corporation.

ELEVENTH. That the services of the trustees of the said corporation shall be gratuitous, but such corporation may provide for the reasonable expenses incurred by trustees in the performance of their duties.

WE THE UNDERSIGNED, for the purpose of forming a corporation under the laws of the State of Delaware, do make, record and file this certificate and do certify that the facts

herein stated are true and we have accordingly hereunto set our respective hands and seals this eighth day of April A. D. 1930.

IN The presence of:

Ralph T. Ellis
M. T. Archer
V. B. Thorne

Henry B. du Pont
J. Simpson Dean
Frank A. McHugh

STATE OF DELAWARE
NEW CASTLE COUNTY } ss

BE IT REMEMBERED, That on this eighth day of April A. D. 1930, personally came before me, the subscriber, a Notary Public for the State of Delaware, Henry Belin du Pont, J. Simpson Dean and Frank A. McHugh, parties to the foregoing Certificate of Incorporation, known to me personally to be such and severally acknowledged that they signed, sealed and delivered the same as their several voluntary act and deed and that the facts herein stated were truly set forth.

GIVEN under my hand and seal of office, the day and year aforesaid.

J. H. Cassidy
Notary Public.

STATE OF DELAWARE
Office of Secretary of State

I, Charles H. Grantland, Secretary of State of the State of Delaware, do hereby certify that the above and foregoing is a true and correct copy of Certificate of Incorporation of the "Welfare Foundation, Incorporated" as received and filed in this office the ninth day of April A. D. 1930, at 9 o'clock A. M.

IN TESTIMONY WHEREOF I have hereunto set my hand and official seal, at Dover, this ninth day of April in the year of our Lord one thousand nine hundred and thirty.

Charles D. Grantland,
Secretary of State.

EXHIBIT "C."

**MINUTES OF SPECIAL MEETING OF
BOARD OF DIRECTORS
CHRISTIANA SECURITIES COMPANY**

A special meeting of the Board of Directors was held at the office of the company, Wilmington, Delaware, on the 12th day of December, 1919, at 2 o'clock P.M.

Present: Messrs. Irene du Pont, Lamot du Pont, A. Felix du Pont and J. J. Raskob.

Absent: P. S. du Pont and R. R. M. Carpenter.

The minutes of the previous meeting were read and on motion approved.

A report was received from the Treasurer dated December 11th, 1919 advising that the Finance Committee of E. I. du Pont de Nemours & Company had tentatively approved a plan for interesting the members of its Executive Committee as substantial partners in the corporation, which plan requires 9000 shares of common stock; that it is not possible to purchase said stock in the market except at what would perhaps be considered exorbitant prices and that there is grave doubt as to the legality of issuing 9000 shares from the company's unissued stock for this purpose; that Mr. Pierre S. du Pont is willing to sell 9000 shares of common stock of du Pont Company for the purposes of the plan and that inasmuch as this company is the principal stockholder in E. I. du Pont de Nemours & Company and is deeply interested in its success, he recommended that the proper officers be authorized to endorse and deliver up to 9000 shares of common stock of E. I. du Pont de Nemours & Company to Mr. P. S. du Pont as a loan taking as security from him 3800 shares of stock of the Christiana Securities Company.

After discussion it was moved and unanimously carried that the above mentioned report of the Treasurer dated

December 11th, 1919 be accepted and ordered filed and recommendations contained therein approved and

RESOLVED that Irene du Pont, Vice President and J. Raskob, Treasurer be and are hereby authorized to endorse and deliver to P. S. du Pont or his nominees 9000 shares of the common stock of E. I. du Pont de Nemours & Company registered on the books of the said corporation in the name of this company.

There being no further business the meeting, on motion, adjourned.

J J RASKOB
Secretary

EXHIBIT "D."

MEMORANDA OF AGREEMENT made this 23rd day of December, 1919, between **CHRISTIANA SECURITIES COMPANY**, a corporation, and **PIERRE S. DUPONT**, of Wilmington, Delaware,

WITNESSETH:

WHEREAS, the Christiana Securities Company has, pursuant to resolution of its Board of Directors, loaned to Pierre S. duPont Nine Thousand (9,000) shares of the common stock of E. I. duPont de Nemours and Company upon the terms hereinafter set forth;

IT IS THEREFORE AGREED between the parties hereto that the Nine Thousand (9,000) shares of stock so loaned shall be returned in kind by Pierre S. duPont within ten (10) years from the date hereof, and that concurrently with the delivery of said Nine Thousand (9,000) shares, duly endorsed so as to enable said Pierre S. duPont to have the same duly transferred on the books of the said Company to his name or to his nominees, the said Pierre S. duPont shall deliver to the Christiana Securities Company, with the necessary assignments and power of attorney to effect transfer on the books of the Christian Securities Company

Thirty-Eight Hundred (3,800) shares of the capital stock of the Christiana Securities Company, to be held by said last named Company as security for the return of the Nine Thousand (9,000) shares of common stock of the duPont Company so loaned.

IT IS AGREED that all dividends on said Thirty-Eight Hundred (3,800) shares of the stock of the Christiana Securities Company shall be paid to Pierre S. duPont, and that all dividends paid on said Nine Thousand (9,000) shares of duPont Company stock, or an amount equivalent thereto, shall be paid by Pierre S. duPont to the Christiana Securities Company as and when said dividends are declared and paid.

Upon the delivery to the Christiana Securities Company of the Nine Thousand (9,000) shares of the common stock of E. I. duPont de Nemours and Company, duly endorsed, the Christiana Securities Company shall return to Pierre S. duPont the Thirty-Eight Hundred (3,800) shares of Christiana Securities Company stock so pledged to secure said loan.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and year first above written.

CHRISTIANA SECURITIES COMPANY

By IRÉNÉE DU PONT

President.

Attest J J RASKOB

Secretary.

PIERRE S DU PONT

Witness:

C. D. HARTMAN JR.

Rec'd Cert. No. 57 for 3800 shs. Stock Christiana Securities Co. as provided for in this agreement.

CHRISTIANA SECS. CO.

J J RASKOB, Treas.

EXHIBIT "E."

December 11th, 1919.

TO: BOARD OF DIRECTORS,**CHRISTIANA SECURITIES COMPANY,****FROM: TREASURER.**

The finance committee of E. I. duPont deNemours & Company has tentatively approved a plan for interesting the members of its executive committee as substantial partners in the corporation which plan requires nine thousand (9,000) shares of common stock. It is not possible to purchase this stock in the market except at what would perhaps be considered exorbitant prices and there is grave doubt as to the legality of issuing nine thousand (9,000) shares from the company's unissued stock for this purpose.

Mr. Pierre S. duPont is willing to sell nine thousand (9,000) shares of common stock of E. I. duPont deNemours & Company for the purposes of the plan. As he has no stock it will be necessary for him to sell short which in turn makes it necessary for him to borrow said stock.

As the Christiana Securities Company is so deeply interested in any plan that has to do with the success of E. I. duPont deNemours & Company in which it is the principal stockholder, I recommend that this Board authorize the officers to endorse and deliver up to nine thousand (9,000) shares of common stock of E. I. duPont deNemours & Company to Mr. Pierre S. duPont as a loan, taking as security from him 3,800 shares of stock of the Christiana Securities Company duly endorsed in blank under such form of agreement as may be approved by our attorney, outlining the fact that said 3,800 shares of Christiana Securities Company are held as collateral to a promise of the said Mr. Pierre S. duPont to return said nine thousand (9,000) shares of common stock of E. I. duPont deNemours & Company to our treasury within ten years; that all dividends on said 3,800 shares of Christiana Securities Company stock shall be paid to Mr. Pierre S.

duPont and that all dividends declared on said nine thousand (9,000) shares of E. I. duPont deNemours & Company stock, or an amount equivalent thereto, shall be remitted by said Mr. Pierre S. duPont to the Christiana Securities Company from time to time as they are declared and paid.

It is understood, of course, that if less than nine thousand (9,000) shares of common stock of E. I. duPont deNemours & Company are borrowed, there will be a proportionate reduction of shares of Christiana Securities Company stock lodged with us as collateral to secure the terms of the agreement.

I have talked with some of the principal stockholders, viz., Messrs. Tallman and Coyne and H. F. Brown with respect to this matter and they unanimously approve of the recommendation contained herein.

EXHIBIT "F."

AGREEMENT made this fourth day of January, 1923, between CHRISTIANA SECURITIES COMPANY, a corporation of the State of Delaware, and PIERRE S. DUPONT, a resident of the City of Wilmington, County of New Castle, State of Delaware; witnesseth:

WHEREAS, on the 23d day of December, 1919, the Christiana Securities Company lent to Pierre S. duPont nine thousand (9,000) shares of the common stock of E. I. duPont deNemours and Company under the terms set forth in that agreement; and

WHEREAS, the said E. I. duPont deNemours and Company has declared four stock dividends as follows:

June 15, 1920	2½%
September 15, 1920	2½%
December 15, 1920	2½%
December 15, 1922	50%

IT IS HEREBY AGREED that the liability of the said Pierre S. duPont from this date on is fourteen thousand five hundred twelve (14,512) shares of E. I. duPont deNemours and Company common stock which liability shall include all dividends hereafter paid on said Fourteen thousand five hundred twelve shares of E. I. duPont deNemours and Company common stock.

WHEREAS, under the said agreement of the 23d day of December, 1919, the said Pierre S. duPont deposited with the Christiana Securities Company as collateral on the above mentioned stock loan three thousand eight hundred (3,800) shares of the capital stock of the Christiana Securities Company, which company has recently declared the following stock dividends; to wit: 200% in 7% Preferred and 100% of its common stock;

IT IS HEREBY FURTHER AGREED, through mutual consent and convenience, that the said Pierre S. duPont shall deposit with the Christiana Securities Company additional collateral, as follows:

Eleven thousand four hundred (11,400) shares of the common stock of the Christiana Securities Company.

In all other respects the terms of the agreement of the 23rd day of December, 1919, remain unchanged.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this fourth day of January, 1923.

CHRISTIANA SECURITIES COMPANY

By IRÉNÉE DU PONT

President

PIERRE S. DU PONT

Witness:

HENRY DAVIS

F. A. McHUGH

EXHIBIT "G."

AGREEMENT made this twelfth day of August 1925, between **CHRISTIANA SECURITIES COMPANY**, a corporation of the State of Delaware, and **PIERRE S. DUPONT**, a resident of the City of Wilmington, County of New Castle, State of Delaware; witnesseth:

WHEREAS, on the 23d day of December, 1919, the Christiana Securities Company lent to Pierre S. duPont nine thousand (9,000) shares of the common stock of E. I. duPont deNemours and Company under the terms set forth in that agreement; and

WHEREAS, the said E. I. duPont deNemours and Company has declared five stock dividends as follows:

June 15, 1920	2½%
September 15, 1920	2½%
December 15, 1920	2½%
December 15, 1922	50%
August 10, 1925	40%

AND, WHEREAS, Mr. P. S. duPont delivered to Christiana Securities Company the stock dividend he received on nine thousand (9,000) shares, as follows:

June 15, 1920	225 shares
Sept. 15, 1920	225 "

and on December 27, 1920 borrowed additional shares of E. I. du Pont deNemours & Company common stock in the amount of four hundred and fifty (450) shares.

IT IS HEREBY AGREED that the liability of the said Pierre S. duPont from this date on is twenty thousand three hundred sixteen (20,316) shares of E. I. duPont deNemours and Company common stock which liability shall include all dividends hereafter paid on said Twenty thousand three hundred sixteen (20,316) shares of E. I. duPont deNemours and Company common stock.

Exhibit "G" of Stipulation of Facts

WHEREAS, under the said agreement of the 23d day of December, 1919, the said Pierre S. duPont deposited with the Christiana Securities Company as collateral on the above mentioned stock three thousand eight hundred

3,800 shares

of the capital stock of the Christiana Securities Co., which company has since declared the following stock dividends; to wit: 200% in 7% Preferred and 100% of its common stock; and

Under an agreement dated January 4th, 1923, said Pierre S. duPont deposited with the Christiana Securities Company additional collateral, viz.

11,400 shares

of the common stock of Christiana Securities Co.

Making a total of shares of Christiana Securities Company common stock deposited.

15,200 "

On June 16, 1924 the said Pierre S. duPont withdrew

7,880 "

of Christiana Securities Company common stock and substituted therefor \$850,000. par value of miscellaneous municipal bonds, per attached list,

Leaving a balance of Christiana Securities Company common stock now held as collateral

7,320 "

In all other respects the terms of the agreement of the 23rd day of December, 1919, remain unchanged.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this twelfth day of August 1925.

CHRISTIANA SECURITIES COMPANY

By IRÉNÉE DU PONT

Vice-President

PIERRE S. DU PONT

Witness:

F. A. McHUGH

R. T. ELLIS

**LIST OF BONDS DEPOSITED WITH
CHRISTIANA SECURITIES COMPANY AS COLLATERAL**

\$25,000.	City and County of San Francisco Relief Home Bond, 5's, 1930,
\$25,000.	City and County of San Francisco Relief Home Bond, 5's, 1929,
\$50,000.	Seattle School Bond, Series 9, 4% School Bldg. Bond, 1929,
\$25,000.	The City of Cincinnati Rapid Transit Railway Bond, 5's, 1967,
\$25,000.	State of Utah, Salt Lake City School District, City School Bond, Series 11, 5's, 1939,
\$50,000.	City of Elizabeth, County of Union, State of N. J. Temporary Loan Bond, 4½'s, 1930,
\$50,000.	City of St. Paul, State of Minnesota, County of Ramsey, Library Bond, 4½'s, 1943,
\$25,000.	City of Cleveland, Ohio, 4½'s, 1932 (Registered Bond)
\$10,000.	Claymont Special School District, State of Delaware, School Building Bond of 1922, 5¼'s, 1929,
\$10,000.	Claymont Special School District, State of Delaware, School Building Bond of 1922, 5¼'s, 1930,
\$10,000.	Claymont Special School District, State of Delaware, School Building Bond of 1922, 5¼'s, 1933,
\$10,000.	Claymont Special School District, State of Delaware, School Building Bond of 1922, 5¼'s, 1935,
\$10,000.	City of Woonsocket Sewer Bond, dated June 1, 1922, 4¼'s, 1929,
\$ 5,000.	City of Woonsocket Sewer Bond, dated June 1, 1922, 4¼'s, 1930,
\$25,000.	Joint Stock Bond Loan, Charles- town, West Va. 5'sNov. 1, 1932
\$25,000.	City of Denver School 5sNov. 1, 1953

Exhibit "H" of Stipulation of Facts

\$25,000.	City of Denver 5s	Nov. 1, 1932
\$50,000.	City of Elizabeth, New Jersey 4½s	May 1, 1929
\$50,000.	County of Mahoning, Ohio, 6s...	Mch. 1, 1930
\$50,000.	Knoxville (City of) 5½s	Sept. 1, 1950
\$25,000.	City of Los Angeles, California 4¾s	Sept. 1, 1932
\$50,000.	Atlantic County, New Jersey 5s...	Aug. 1, 1929
\$50,000.	State of Kansas 4½s	May 1, 1933
\$50,000.	Federal Land Bank Loan of Nebraska	Jan. 1, 1933-43
\$20,000.	City of Bridgeport, Conn., Sewer Construction Bonds 5's, 1928,	
\$100,000.	The City of Jersey City, 4% Water Bonds, 1932 (Registered Bonds)	
<hr/>		
\$850,000.		

EXHIBIT "H."

AGREEMENT made this twenty-eighth day of October 1926, between CHRISTIANA SECURITIES COMPANY, a corporation of the State of Delaware, and PIERRE S. DUPONT, a resident of the City of Wilmington, County of New Castle, State of Delaware; witnesseth:

WHEREAS, on the 23d day of December, 1919, the Christiana Securities Company lent to Pierre S. duPont nine thousand (9,000) shares of the common stock of E. I. duPont deNemours and Company under the terms set forth in that agreement; and

WHEREAS, the said E. I. duPont deNemours and Company has declared five stock dividends as follows:

June 15, 1920	2½%
September 15, 1920	2½%
December 15, 1920	2½%
December 15, 1922	50%
August 10, 1925	40%

AND, WHEREAS, Mr. P. S. duPont delivered to Christiana Securities Company the stock dividend he received on nine thousand (9,000) shares, as follows:

June 15, 1920	225 shares
Sept. 15, 1920	225 "

and on December 27, 1920 borrowed additional shares of E. I. du Pont de Nemours & Company common stock in the amount of four hundred and fifty (450) shares, and delivered to Christiana Securities Company out of the stock dividend he received on December 15, 1922 one-half of one share, and

WHEREAS, E. I. duPont de Nemours & Company issued a new kind of common stock having no par value, to replace the \$100. par value common stock heretofore in use, and on October 28, 1926 effected an exchange of the \$100. par value common stock for the new no-par value common stock on the basis of two (2) shares of the new common stock for one (1) share of the old common stock;

Now, THEREFORE, IT IS HEREBY AGREED that the liability of the said Pierre S. duPont from this date on is forty thousand six hundred thirty-two (40,632) shares of E. I. duPont de Nemours and Company no-par value common stock as follows:

12/23/19	Loaned to Mr. P. S. duPont	9,000 shares
6/15/20	Stock dividend 2½%— 225 shares	Delivered to Christiana Sec. Co. by Mr. P. S. duPont
9/15/20	Stock dividend 2½%— 225 shares	Do
12/15/20	Stock dividend 2½%	225 shares
12/17/20	Loaned to Mr. P. S. duPont	450 "
TOTAL		9,675 "

Exhibit "H" of Stipulation of Facts

12/15/22	Stock Dividend 50%	4,837.5 shares
	TOTAL	14,512.5 "
12/15/22	Delivered to C. S. Co. by Mr. duPont	.5 "
	BALANCE	14,512 "
8/10/25	Stock dividend 40%	5,804 "
	TOTAL	20,316 "
10/28/26	DuPont Com. \$100. par value stock exchanged for new no-par value stock on basis 2 shares new for one share of old stock	40,632 "

which liability shall include all dividends hereafter paid on said forty thousand six hundred thirty-two (40,632) shares of E. I. duPont de Nemours and Company no-par value common stock.

WHEREAS, under the said agreement of the 23d day of December 1919, the said Pierre S. duPont deposited with the Christiana Securities Company as collateral on the above mentioned stock three thousand eight hundred

3,800 shares

of the capital stock of the Christiana Securities Co., which company has since declared the following stock dividends; to wit: 200% in 7% Preferred and 100% of its common stock; and

Under an agreement dated January 4th, 1923, said Pierre S. duPont deposited with the Christiana Securities Co. additional collateral, viz.

11,400 shares

of the common stock of Christiana Securities Co.

Making a total of shares of Christiana Securities Company common stock deposited.. 15,200 "

Exhibit "H" of Stipulation of Facts

59

On June 16, 1924 the said Pierre S. duPont withdrew 7,880 shares of Christiana Securities Company common stock and substituted therefor \$850,000. par value of miscellaneous municipal bonds, per attached list, Leaving a balance of Christiana Securities Company common stock now held as collateral 7,320. "

In all other respects the terms of the agreement of the 23rd day of December, 1919, remain unchanged.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this twenty-eighth day of October, 1926.

CHRISTIANA SECURITIES COMPANY

By IRÉNÉE DU PONT
Vice-President
PIERRE S. DU PONT

Witness:

W. E. KOLEK
RALPH T. ELLIS

**LIST OF BONDS DEPOSITED WITH
CHRISTIANA SECURITIES COMPANY AS COLLATERAL**

\$25,000.	City and County of San Francisco Relief Home Bond, 5's, 1930,
\$25,000.	City and County of San Francisco Relief Home Bldg., 5's, 1929,
\$50,000.	Seattle School Bond, Series 9, 4% School Bldg. Bond, 1929,
\$25,000.	The City of Cincinnati Rapid Transit Railway Bond, 5's, 1967,
\$25,000.	State of Utah, Salt Lake City School District, City School Bond, Series 11, 5's, 1939,
\$50,000.	City of Elizabeth, County of Union, State of N. J. Temporary Loan Bond, 4½'s, 1930,
\$50,000.	City of St. Paul, State of Minnesota, County of Ramsey, Library Bond, 4½'s, 1943,
\$25,000.	City of Cleveland, Ohio, 4½'s, 1932 (Registered Bond)
\$10,000.	Claymont Special School District, State of Delaware, School Building Bond of 1922, 5¼'s, 1929,
\$10,000.	Claymont Special School District, State of Delaware, School Building Bond of 1922, 5¼'s, 1930,
\$10,000.	Claymont Special School District, State of Delaware, School Building Bond of 1922, 5¼'s, 1933,
\$10,000.	Claymont Special School District, State of Delaware, School Building Bond of 1922, 5¼'s, 1935,
\$10,000.	City of Woonsocket Sewer Bond, dated June 1, 1922, 4¼'s, 1929,
\$ 5,000.	City of Woonsocket Sewer Bond, dated June 1, 1922, 4¼'s, 1930,
\$25,000.	Joint Stock Bond Loan, Charles-town, West Va, 5's Nov. 1, 1932
\$25,000.	City of Denver School 5s Nov. 1, 1953

Exhibit "H" of Stipulation of Facts 61

\$25,000.	City of Denver 5s	Nov. 1, 1932
\$50,000.	City of Elizabeth, New Jersey 4½s	May 1, 1929
\$50,000.	County of Mahoning, Ohio, 6s...	Mch. 1, 1930
\$50,000.	Knoxville (City of) 5½s	Sept. 1, 1950
\$25,000.	City of Los Angeles, California 4¾s	Sept. 1, 1932
\$50,000.	Atlantic County, New Jersey 5s..	Aug. 1, 1929
\$50,000.	State of Kansas 4½s	May 1, 1933
\$50,000.	Federal Land Bank Loan of Nebraska	Jan. 1, 1933-43
\$20,000.	City of Bridgeport, Conn., Sewer Construction Bonds 5's, 1928,	
\$100,000.	The City of Jersey City, 4% Water Bonds, 1932 (Registered Bonds)	
<hr/> \$850,000.		

EXHIBIT "I."

AGREEMENT made and entered into this 21st day of January, A. D. 1929, by and between **CHRISTIANA SECURITIES COMPANY**, a corporation of Delaware, and **PIERRE S. DUPONT**, of the City of Wilmington, County of New Castle, State of Delaware, **WITNESSETH:**

WHEREAS on the 23rd day of December, 1919, **CHRISTIANA SECURITIES COMPANY** lent to **PIERRE S. DUPONT** Nine Thousand (9,000) shares of the common stock of **E. I. du Pont de Nemours and Company**, of the par value of One Hundred Dollars (\$100) per share, under the terms set forth in said agreement; and

WHEREAS, by virtue of the declaration and payment by **E. I. du Pont de Nemours and Company** of a total of five stock dividends during the years 1920, 1922 and 1925, from which stock dividends received by **PIERRE S. DUPONT** there were paid over to **CHRISTIANA SECURITIES COMPANY** a total of Four Hundred Fifty (450) shares, and by virtue of the additional lending by **CHRISTIANA SECURITIES COMPANY** to **PIERRE S. DUPONT** on December 27, 1920 of Four Hundred Fifty (450) shares of said common stock of **E. I. du Pont de Nemours and Company**, and the delivery by **PIERRE S. DUPONT** to **CHRISTIANA SECURITIES COMPANY** on December 15, 1922 of one-half ($\frac{1}{2}$) of one share of said common stock of **E. I. du Pont de Nemours and Company**, and by virtue of the exchange in the year 1926 of two shares of the common stock of said **E. I. du Pont de Nemours and Company** without nominal or par value for each share of common stock of the par value of One Hundred Dollars per share outstanding, the liability of **PIERRE S. DUPONT** to **CHRISTIANA SECURITIES COMPANY**, from October 28, 1926 to the present date, amounted to Forty Thousand Six Hundred Thirty-two (40,632) shares of common stock without nominal or par value of **E. I. du Pont de Nemours and Company**, all as set forth in more detail in agreement entered into between the parties hereto on October 28, 1926, to which agreement reference is hereby made for greater particularity; and

WHEREAS at this date the said PIERRE S. DUPONT has on deposit with CHRISTIANA SECURITIES COMPANY, as collateral to secure the above mentioned loan of common stock of E. I. du Pont de Nemours and Company, Seven Thousand Three Hundred Twenty (7,320) shares of the common stock of Christiana Securities Company and Eight Hundred Forty Thousand Dollars (\$840,000) face value of State and Municipal Bonds; and

WHEREAS on January 21, 1929, E. I. du Pont de Nemours and Company exchanged for the common stock of said Company without nominal or par value outstanding shares of the common stock of said Company of the par value of Twenty Dollars (\$20) per share on the basis of three and one-half ($3\frac{1}{2}$) of said shares of the par value of Twenty Dollars (\$20) per share for each share of the common stock outstanding without nominal or par value:

NOW THEREFORE, IT IS HEREBY AGREED that the liability of the said PIERRE S. DUPONT to CHRISTIANA SECURITIES COMPANY from this date forth is One Hundred Forty-two Thousand, Two Hundred Twelve (142,212) shares of the common stock of E. I. du Pont de Nemours and Company of the par value of Twenty Dollars (\$20) per share, determined as follows:

12/23/19	Loaned to Pierre S. duPont,	9,000 shares (\$100 par value)
6/15/20	Stock dividend $2\frac{1}{2}\%$ —225 shares	Delivered to Christiana Securities Company by Pierre S. duPont
9/15/20	Stock dividend $2\frac{1}{2}\%$ —225 shares	do.
12/15/20	Stock dividend $2\frac{1}{2}\%$,	225 shares
12/27/20	Loaned to Pierre S. duPont,	450 shares
	Total,	<hr/> 9,675 shares

Exhibit "I" of Stipulation of Facts

12/15/22	Stock dividend, 50%,	4,837.5 shares
	Total,	14,512.5 shares
12/15/22	Delivered to Christiana Securities Co. by Pierre S. du Pont,	.5 share
	Balance,	14,512 shares
8/10/25	Stock dividend 40%,	5,804 shares
	Total,	20,316 shares (\$100 par value)
10/28/26	Exchange by du Pont Co. of new no par value stock for \$100 par value stock outstanding on basis 2 shares no par value stock for each share of \$100 par value stock,	40,632 shares (No par value)
1/21/29	Exchange by du Pont Co. of new \$20 par value stock for no par value stock outstanding on basis 3½ shares \$20 par value stock for each share of no par value stock,	142,212 shares, (\$20 par value),

which liability shall include all dividends hereafter paid on said One Hundred Forty-two Thousand, Two Hundred Twelve (142,212) shares of the common stock of E. I. du Pont de Nemours and Company of the par value of Twenty Dollars (\$20) per share.

IT IS FURTHER AGREED between the parties hereto that in all other respects the terms of the agreement of December 23, 1920, and of the agreement of October 28, 1926, both above referred to, shall remain unchanged and in full force and effect.

IN WITNESS WHEREOF CHRISTIANA SECURITIES COMPANY has caused these presents to be executed by officers thereunto duly authorized and sealed with the seal of the corporation, and PIERRE S. DUPONT has hereunto set his hand and seal, this 21st day of January, A. D. 1929.

CHRISTIANA SECURITIES COMPANY

By LAMMOT DUPONT
Vice President

Attest:

FRANK L. GAREY
Asst. Secretary

FRANK A. McHUGH

PIERRE S DU PONT

EXHIBIT "J."

Finance
Committee
Secy's No. 2109

Wilmington, Delaware,
December 22, 1919

FINANCE COMMITTEE

(Mr. M. D. Fisher, Secretary)

Gentlemen:—

In accordance with your action on December 16th, I have interviewed individually the members of the Executive Committee on the subject of an employment contract and have the assent of each one to the provisions you have outlined.

Mr. P. S. duPont has made an offer of 1000 shares of E. I. duPont deNemours & Co. Common stock to each of the

Executive Committee members and each desires to accept the offer. In view of the great desirability of having these men interested as partners in the business and of the difficulty of most of them to finance the purchase, I recommend that the Finance Committee empower the Treasurer to loan to each, for five years, \$320,000, being the purchase price of the stock, and to accept as collateral on each loan 1000 shares of duPont Common stock and insurance policy of \$150,000 on the life of each maker of the note; the premium on these term policies to be paid by the Company.

I also recommend that I be empowered to execute the contract with each member as per the attached form* which has been drawn up by the Legal Department.

As it is particularly desirable that this arrangement be entered into before the end of the year, I should like to have a special meeting of the Finance Committee to take action thereon on Wednesday, the 24th, at 10 A. M.

Very truly yours

(s) IRÉNÉE DU PONT, President

*Contract referred to will be read at the meeting.

EXHIBIT "K."

E. I. DU PONT DE NEMOURS & COMPANY FINANCE COMMITTEE

COMPENSATION TO EXECUTIVE COMMITTEE MEMBERS:

Report was received from the President, dated December 22, 1919 (#2109) in connection with the above-mentioned subject. The President enclosed two suggested contracts with the members of the Executive Committee, same having been prepared by the Legal Department, one being an employment contract and the other a loan contract. After full discussion of the employment contract, the following resolution was offered and unanimously adopted:—

RESOLVED, that the proper Officers of this Company be and they hereby are authorized to enter into the fol-

lowing contract (when approved by the Legal Department) with each of the following employes, viz:—Lam-mot duPont, F. D. Brown, W. S. Carpenter, Jr., A. Felix duPont, J. B. D. Edge, C. A. Meade, C. A. Patterson, F. W. Pickard and W. C. Spruance, members of the Executive Committee:—

"THIS AGREEMENT entered into as of the 1st day of January, 1920, between E. I. DUPONT DENEMOURS AND COMPANY, a corporation (hereinafter referred to as the 'Company'), and.....a duly elected and acting Executive Committeeman of said Company (hereinafter referred to as the 'Committeeman'),

WITNESSETH:

WHEREAS, in the judgment of the Board of Directors of the Company it is advisable to fix and determine the compensation to be paid for the services of the Executive Committeeman in advance of the performance of such services, and to provide for additional compensation to be based upon the duration of such services and the success of the Company's business under the management of its Executive Committee:

THEREFORE, in consideration of the premises, it is mutually agreed as follows:—

(a) That the Committeeman shall receive and the Company shall pay a salary at the rate of Twenty-five Hundred Dollars (\$2500.00) per month.

(b) In case the Committeeman is on the 31st day of December, 1924 still in the employ of the Company as a member of its Executive Committee, or is occupying another position in the employ of the Company approved by the Finance Committee of said Company as equivalent thereto, but not otherwise, the Committeeman shall receive and the Company shall pay as additional compensation the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) in cash.

Exhibit "K" of Stipulation of Facts

(c) In addition to the compensation provided in (a) and (b) aforesaid, the Committeeman shall receive and the Company shall pay one per cent. (1%) of the annual net earnings of the Company received from the capital employed under the supervision and control of its Executive Committee after deducting ten per cent. (10%) on the amount of the Company's capital so employed as shown on the books of the Company on the first day of January in such year, including the present good-will item of \$22,945,619.83, and excluding in the determination of capital so employed the stock of the duPont American Industries and other assets not under the jurisdiction of the Executive Committee of said Company, and excluding in the determination of net earnings all receipts derived from the duPont American Industries or other sources whereof said Executive Committee shall not have the direct management. This additional compensation shall be paid as soon as may be after the 31st day of December in each year, and shall be payable in the common stock of the Company at cost if said stock can be obtained at prices which in the judgment of the Finance Committee are reasonable, otherwise this additional compensation to be payable in cash.

In the event of the termination of this Agreement, by the death of the Committeeman, or otherwise, during the course of any year, the Committeeman, or his estate, shall be paid the stipulated percentage of the net profits provided in paragraph (c) as reckoned up to the time of such termination.

(d) In addition to the compensation provided for in (a) (b) and (c), the Company shall bear and pay the premiums for five (5) years upon an insurance policy for One Hundred and Fifty Thousand Dollars (\$150,000.00) on the life of the Committeeman, calculated at the lowest premium rates at which such insurance can be secured.

The additional compensation herein provided shall be in lieu of "B" Bonus compensation under the bonus plan of the Company.

Nothing herein contained shall be held or construed to limit or qualify in any way the operation of the By-Laws of the Company or the power of the Board of Directors in regard to the election of the Executive Committee or the management of the Company's business.

IN WITNESS WHEREOF the parties hereto have affixed their hands and seals as of the day and year first above written.

E. I. DUPONT DENEMOURS AND COMPANY

By

President

Attest

Secretary
Committeeman

The loan contract was then taken up for consideration and several changes in same suggested, final action being deferred until Mr. J. P. Laffey could be present.

COMPENSATION TO EXECUTIVE COMMITTEE MEMBERS:

Judge Laffey being present, the Committee returned to consideration of the proposed loan contract with the members of the Executive Committee. After full discussion, the following resolution was offered and unanimously adopted:

RESOLVED, that the proper Officers of this Company be and they are hereby authorized to enter into the following contract (when approved by the Legal Department) with each of the following employes, viz:—Lamot duPont, F. D. Brown, W. S. Carpenter, Jr., A. Felix duPont, J. B. D. Edge, C. A. Meade, C. A. Patterson, F. W. Pickard and W. C. Spruance, members of the Executive Committee;

Exhibit "K" of Stipulation of Facts

RESOLVED FURTHER, that the proper Officers of this Company be and they are hereby authorized and empowered to loan to each of said individuals the Three Hundred and Twenty Thousand Dollars (\$320,000.00) provided for in said Agreement:—

"THIS AGREEMENT entered into as of the 26th day of December, 1919, between E. I. DUPONT DENEMOURS AND COMPANY, a corporation, (hereinafter referred to as the 'Company'), and.....a duly elected and acting Executive Committeeman of said Company, (hereinafter referred to as the 'Committeeman'),

WITNESSETH:—

WHEREAS, the Committeeman has purchased one thousand (1,000) shares of the Common stock of the Company at Three Hundred and Twenty Dollars (\$320.00) per share, and has applied to the Company for a loan to finance said purchase, payment of said loan to be secured as hereinafter provided; and

WHEREAS, the making of said loan has been approved by the Finance Committee of the Company:—

NOW, THEREFORE, IT IS HEREBY AGREED

(1) That the Company shall loan to the Committeeman until the 31st day of December, 1924, the sum of Three Hundred and Twenty Thousand Dollars (\$320,000.00) to be used by the Committeeman in paying the purchase price of one thousand (1,000) share of the common stock of the Company; that the Company will open an account with the Committeeman as of the 26th day of December, 1919, wherein the principal of the loan shall be charged together with interest thereon at the rate of five per cent. (5%) per annum from December 15, 1919, calculated quarterly, and wherein shall be credited to the Committeeman all cash dividends paid on said stock. The Committeeman agrees to pay the

Company on the 31st day of December, 1924, the full amount of the balance then due the Company on said loan.

(2) As security for the payment of said loan by the Committeeman, the certificates evidencing the one thousand (1,000) shares of stock aforesaid, together with all dividends thereon, shall be delivered and paid over to the Company and retained in its custody, with duly executed irrevocable dividend orders, powers of attorney, and assignments, and all other instruments requisite to enable the Company to sell or transfer said stock and dividends, in case the stock and dividends do not become deliverable to the Committeeman under this agreement, whether because said Committeeman shall fail to perform his obligation to make payment in full on the date hereinbefore set forth, or whether the Company elects to exercise its option hereinafter set forth to purchase and take over the same.

(3) As further security for the payment of said loan, the Committeeman shall procure and keep in force during the life of this agreement insurance on his life in the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) which policy shall be assigned to the Company. In case the Committeeman is unable to obtain life insurance as aforesaid he shall have the right to deposit in lieu thereof collateral satisfactory to the Company of the value of One Hundred and Fifty Thousand Dollars (\$150,000.00). In the event of the Committeeman's death the proceeds from said life insurance policy, or from the sale of other collateral deposited in lieu thereof, shall be applied by the Company to the payment of said loan. In case the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) which the Company is obligated to pay under the provisions of Paragraph (b) of an employment contract between the parties hereto dated as of January 1, 1920, becomes payable under the terms of said contract, the said One

Hundred and Fifty Thousand Dollars (\$150,000.00) shall be applied by the Company to the payment of said loan.

(4) In consideration of the making of the loan aforesaid, the Committeeman hereby gives and grants to the Company an option to purchase the said one thousand (1,000) shares of stock together with all dividends paid thereon from December 26, 1919, except cash dividends, for an amount equal to the debit balance in his account, which amount shall be credited to his account and the account thus closed, in the event that the Committeeman shall at any time prior to the 31st day of December, 1924, cease to be a member of the Executive Committee of the Company or to hold such other office as the Finance Committee of the Company shall have expressly approved as a substitute therefor under this agreement, whether such cessation shall be voluntary or involuntary, with or without cause, or in the event that the Committeeman shall have continued in office until the 31st day of December, 1924, but shall not have paid said loan in full when it becomes due and payable as hereinbefore provided. In case the Company exercises this option it shall reassign said life insurance policy (or collateral substituted therefor).

(5) It is agreed that in the event of the death of the Committeeman during the life of this contract and while holding the office of Executive Committeeman or a substitute office approved by the Finance Committee as hereinbefore provided, the Company shall have the option to purchase said one thousand (1,000) shares of stock together with all dividends, other than cash dividends, declared thereon, as provided in Paragraph (4) at the then fair market value of said stock and dividends, other than cash dividends, which value shall be credited to the Committeeman's account and a check for the balance, if any, in said account shall be then delivered to his estate.

In case the Company does not exercise the option to purchase the stock as aforesaid, and the Company for any reason is obliged to resort to the security held by it to secure the payments of said loan, it shall, after applying all cash held by it as security to the satisfaction of said loan, sell the stock or other property so held as security in the manner now or hereafter provided by the laws of the State of Delaware for the sale of collaterals, pledged to secure an indebtedness.

IN WITNESS WHEREOF the parties hereto have affixed their hands and seals as of the day and year first above written.

E. I. DUPONT DENEMOURS AND COMPANY

By

President

Attest.

Secretary
Committeeman

It was then moved and unanimously carried that the above-mentioned report from the President dated December 22, 1919 (#2109) be accepted and ordered filed.

This is to certify that the foregoing are true and correct copies of extracts from minutes of meeting of the Finance Committee of E. I. duPont deNemours and Company held on December 24, 1919.

M D FISHER

Assistant Secretary

E. I. duPont deNemours and Company.

EXHIBIT "L."

Wilmington, Delaware,
December 20, 1919.

Messrs. Lammot du Pont,
F. D. Brown,
W. S. Carpenter, Jr.
A. Felix du Pont,
J. B. D. Edge,
C. A. Meade,
C. A. Patterson,
F. W. Pickard,
W. C. Spruance, J.

Gentlemen:—

Attached is a computation used by P. S. du Pont in arriving at a price for Du Pont Common Stock, for the purpose that I spoke to you about on Thursday last.

In Pierre's absence, I think it would be well for you to look over this computation and give him the benefit of any criticism which you may have, either concerning the principle of value^{ing} of this stock, as indicated, or in the detail computation of the amount.

Very truly yours,

IRÉNÉE DU PONT, President
Irenee du Pont

[Note: The computation described in Exhibit L (letter from Irene du Pont, President, dated December 1919) is omitted by consent. It was a report on "Net asset Value du Pont Common stock," addressed to P. S. du Pont, Chairman, from Treasurer, showing detailed computation resulting in conclusion that net asset value of du Pont common stock was \$320.94 per share, which said value is set out in the Court's finding number 22.]

EXHIBIT "M."

[Omitted by consent. It consisted of four ledger sheets of Laird & Company, brokers, showing transactions in du Pont Common stock from December 1, 1919, to July 2, 1920. It is agreed between the parties that the original Exhibits L and M may be filed with the Clerk of the Circuit Court of Appeals for the Third Circuit, if requested either by plaintiff or defendant.]

EXHIBIT "N."

THIS TRUST AGREEMENT made this 30th day of November, A. D. 1918, by and between **PIERRE S. DUPONT**, of the City of Wilmington, County of New Castle and State of Delaware, of the first part, and **H. RODNEY SHARP**, of said City, County and State, of the second part,

WITNESSETH:

THAT WHEREAS the said Pierre S. duPont is desirous of providing funds for the construction and outfitting of a building to be erected on the grounds of the Chester County Hospital at West Chester, in the County of Chester and Commonwealth of Pennsylvania, said building to be used in connection with and to form a part of the buildings now owned and occupied by said Chester County Hospital, and to be erected to and designated as a memorial to Lewes A. Mason, deceased; and

WHEREAS the said Pierre S. duPont to this end desires to provide funds in the amount of Three Hundred Thousand Dollars (\$300,000.00) at the times and according to the terms hereinafter set forth;

Now, THEREFORE, in consideration of the sum of One Dollar (\$1.00) by the said party of the second part to the party of the first part in hand paid, the receipt whereof is hereby acknowledged, the party of the first part has bargained, sold, assigned, transferred, set over and delivered

unto and by these presents does bargain, sell, assign, transfer, set over and deliver unto the party of the second part, the following described personal property, to-wit: ten thousand (10,000) shares of the common capital stock of E. I. du Pont de Nemours and Company, a corporation organized and existing under the laws of the State of Delaware, as evidenced by certificate number E. 11706,....., in trust nevertheless for the following purposes and subject to the following provisions, viz:—

ARTICLE I. The said trustee shall collect and receive all dividends, income, profits, gains and benefits arising from said shares of stock or from any other securities which may be substituted for said shares as hereinafter provided, and from time to time as said income, dividends, gains and profits shall accrue, to pay over the same to the Treasurer of the said Chester County Hospital in payment of duly approved vouchers covering the whole or any part of the cost connected with or incident to the constructing and outfitting of the aforesaid hospital building.

ARTICLE II. The said trustee shall have the power and authority solely in his discretion to exchange said ten thousand (10,000) shares of the common capital stock of E. I. du Pont de Nemours and Company for other securities or to sell the same and reinvest the proceeds in other securities, such reinvestments to be subject to all the terms and conditions of this trust.

ARTICLE III. Upon the death, incapacity or refusal to act of the said trustee, Lammot duPont, of Christiana Hundred, New Castle County, State of Delaware, and Irene duPont, of Christiana Hundred, New Castle County, State of Delaware, in the order named, are hereby appointed to the trusteeship with all the powers and subject to all the conditions, restrictions and limitations of this trust.

ARTICLE IV.-(a) This trust is founded upon the express condition that all payments made on account of the construction or outfitting of said hospital building or in con-

nection therewith, shall be in accordance with plans which have the approval of the party of the first part. Such payments shall be made by the trustee entirely in his discretion, and there shall be no liability upon him for the application, misapplication or non-application of the funds for the construction and outfitting of said hospital building. It is, however, specifically provided that no vouchers shall be paid unless same shall be approved by the trustees of the Chester County Hospital or their agent.

(b) When the total payments made by the trustee as aforesaid shall aggregate the sum of Three Hundred Thousand Dollars (\$300,000.00), the principal trust fund and any income, profits or benefits remaining in the hands of the trustee, cash or otherwise, shall be returned to the party of the first part or to the legal representative of his estate.

(c) If the said hospital building shall be constructed and outfitted at a cost less than Three Hundred Thousand Dollars (\$300,000.00), the trustee shall turn over the difference between this sum and Three Hundred Thousand Dollars (\$300,000.00) to the trustees of the Chester County Hospital, the same to be invested by them as an endowment fund, the income from which to be available for the maintenance of said hospital.

(d) In the event that the income from this trust fund is insufficient to speedily meet the payments due for the construction and outfitting of said hospital building, the trustee is hereby empowered to borrow such sums as may be necessary to meet these payments, pledging all or any part of the trust fund as collateral to secure such loan or loans, and he shall further in his discretion be empowered to sell a portion of the trust fund to meet such payments.

IN CONSIDERATION of the premises and the mutual promises and covenants hereinbefore promised to be kept and performed, the party of the second part hereby accepts the within trust, subject to all the conditions, restrictions and

Exhibit "O" of Stipulation of Facts

limitations thereunto belonging or in any wise appertaining, and hereby expressly covenants and agrees that he will in all things faithfully discharge the duties of trustee as aforesaid.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals the day and year hereinbefore written.

PIERRE S. DU PONT (SEAL)

H. RODNEY SHARP (SEAL)

Signed, sealed and delivered
in the presence of:

RALPH T. ELLIS

STATE OF DELAWARE
COUNTY OF NEW CASTLE } ss

BE IT REMEMBERED, that on this 30 day of November, A. D. 1918, personally came before me, G. D. Hopkins, a Notary Public in and for the State and County aforesaid, Pierre S. duPont and H. Rodney Sharp, parties to this Indenture, known to me personally to be such, and severally acknowledged this indenture to be their deed.

Given under my hand and seal of office the day and year aforesaid.

G. D. HOPKINS

(Seal)

Notary Public.

EXHIBIT "O."

This Agreement made this twenty sixth day of September, A. D. 1919, by and between Pierre S. duPont of the City of Wilmington, New Castle County and State of Delaware, of the first part, and H. Rodney Sharp, Trustee, of the said City, County and State, of the second part.

WHEREAS, by a Trust Agreement dated the thirtieth day of November, A. D. 1918, between the said Pierre S. duPont and said H. Rodney Sharp, it is recited as follows:

That Whereas, the said Pierre S. duPont is desirous of providing funds for the construction and outfitting of a building to be erected on the grounds of the Chester County Hospital of West Chester, in the County of Chester and Commonwealth of Pennsylvania, said building to be used in connection with and to form a part of the buildings now owned and occupied by said Chester County Hospital, and to be erected to and designated as a memorial to Lewes A. Mason, deceased;

And Whereas, the said Pierre S. duPont to this end desires to provide funds in the amount of Three Hundred Thousand Dollars (\$300,000) "etc., etc."

AND WHEREAS, it now appears that money or funds in excess of Three Hundred Thousand Dollars (\$300,000) must be provided for the construction and outfitting of the building to be erected to and designated as a memorial to Lewes A. Mason, deceased.

AND WHEREAS, said Pierre S. duPont desires to provide additional money or funds in the amount of Three Hundred Thousand Dollars (\$300,000) to be applied by said trustee as provided in said Trust Agreement dated the thirtieth day of November, A. D. 1918.

Now, this agreement witnesseth, and it is hereby agreed and declared as follows:

(1) That this Agreement is supplemental to the said Trust Agreement dated the thirtieth day of November, A. D. 1918, made between said Pierre S. duPont of the first part and the said H. Rodney Sharp of the second part, a copy of which Trust Agreement is hereto annexed and made a part hereof.

(2) (a) That H. Rodney Sharp, Trustee, or the other trustee or trustees of these presents, shall continue to stand possessed of the stock, shares and securities so sold, assigned, transferred, set over and delivered to him under said Trust Agreement, dated the thirtieth day of November, A. D. 1918 and shall continue to hold and administer said principal trust-fund and the income, profits and benefits there-

Exhibit "O" of Stipulation of Facts

from under and pursuant to the trusts contained in said Trust Agreement until said income, profits or benefits shall aggregate the further sum of Three Hundred Thousand Dollars (\$300,000), whereby the total income, profits or benefits received by said trustee shall aggregate Six Hundred Thousand Dollars (\$600,000).

(b) When the total payments made by the trustee as aforesaid shall aggregate the sum of Six Hundred Thousand Dollars (\$600,000) the principal trust-fund and any income, profits or benefits remaining in the hands of the trustee, cash or otherwise, shall be returned to the party of the first part or to the legal representative of his estate.

(c) If the said hospital building shall be constructed and outfitted at a cost less than Six Hundred Thousand Dollars (\$600,000), the trustee shall turn over the difference between this sum and Six Hundred Thousand Dollars (\$600,000), to the trustees of the Chester County Hospital, the same to be invested by them as endowment fund, the income from which to be available for the maintenance of said hospital.

IN CONSIDERATION of the premises and the mutual promises and covenants hereinbefore promised to be kept and performed, the party of the second part hereby accepts the within supplemental trust, subject to all the conditions, restrictions and limitations thereunto belonging or in any wise appertaining, and hereby expressly covenants and agrees that he will in all things faithfully discharge the duties of trustee as aforesaid.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals the day and year hereinbefore written.

Signed, sealed and delivered
in the presence of:

SOPHIE E. BAIRD

PIERRE S. DU PONT (SEAL)

H. RODNEY SHARP (SEAL)

Trustee

STATE OF DELAWARE
NEW CASTLE COUNTY } ss.

BE IT REMEMBERED, that on this 26 day of September, A. D. 1919, personally came before me G. D. HOPKINS, a Notary Public in and for the State and County aforesaid, Pierre S. duPont and H. Rodney Sharp, Trustee, parties to this Supplemental Agreement, known to me personally to be such, and severally acknowledged this Agreement to be their deed.

GIVEN under my hand and seal of office the day and year aforesaid.

(Seal) G. D. HOPKINS
Notary Public

(Copy)

THIS TRUST AGREEMENT made this 30th day of November, A. D. 1918, by and between PIERRE S. duPONT, of the City of Wilmington, County of New Castle and State of Delaware, of the first part, and H. RODNEY SHARP, of said City, County and State, of the second part.

WITNESSETH:

THAT WHEREAS, the said Pierre S. duPont is desirous of providing funds for the construction and outfitting of a building to be erected on the grounds of the Chester County Hospital of West Chester, in the County of Chester and Commonwealth of Pennsylvania, said building to be used in connection with and to form a part of the buildings now owned and occupied by said Chester County Hospital, and to be erected to and designated as a memorial to Lewes A. Mason, deceased; and

WHEREAS, the said Pierre S. duPont to this end desires to provide funds in the amount of Three Hundred Thousand Dollars, (\$300,000) at the times and according to the terms hereinafter set forth:

Now, ~~THE~~ THEREFORE, in consideration of the sum of One Dollar (\$1.00), by the said party of the second part to the party of the first part in hand paid, the receipt whereof is hereby acknowledged, the party of the first part has bargained, sold, assigned, transferred, set over and delivered unto and by these presents does bargain, sell, assign, transfer, set over and deliver unto the party of the second part the following described personal property, to-wit: ten thousand (10,000) shares of the common capital stock of E. I. duPont deNemours and Company, a corporation organized and existing under the laws of the State of Delaware, as evidenced by certificate number E. 11706 in trust nevertheless for the following purposes and subject to the following provisions, viz:—

ARTICLE I. The said trustee shall collect and receive all dividends, income, profits, gains and benefits arising from said shares of stock or from any other securities which may be substituted for said shares as hereinafter provided, and from time to time as said income, dividends, gains and profits shall accrue, to pay over the same to the Treasurer of the said Chester County Hospital in payment of duly approved vouchers covering the whole or any part of the cost connected with or incident to the constructing and outfitting of the aforesaid hospital building.

ARTICLE II The said trustee shall have the power and authority solely in his discretion to exchange said ten thousand (10,000) shares of the common capital stock of E. I. duPont deNemours and Company for other securities or to sell the same and reinvest the proceeds in other securities, such reinvestments to be subject to all the terms and conditions of this trust.

ARTICLE III Upon the death, incapacity or refusal to act of the said Trustee, Lammot duPont, of Christiana Hundred, New Castle County, State of Delaware, and Irene duPont, of Christiana Hundred, New Castle County, State of Delaware, in the order named, are hereby ap-

pointed to the trusteeship with all the powers and subject to all the conditions, restrictions and limitations of this trust.

ARTICLE IV (a) This trust is founded upon the express condition that all payments made on account of the construction or outfitting of said hospital building or in connection therewith, shall be in accordance with plans which have the approval of the party of the first part. Such payments shall be made by the trustee entirely in his discretion, and there shall be no liability upon him for the application, misapplication or non-application of the funds for the construction and outfitting of said hospital building. It is, however, specifically provided that no vouchers shall be paid unless same shall be approved by the trustees of the Chester County Hospital or their agent.

(b) When the total payments made by the trustee as aforesaid shall aggregate the sum of Three Hundred Thousand Dollars (\$300,000), the principal trust-fund and any income, profits or benefits remaining in the hands of the trustee, cash or otherwise, shall be returned to the party of the first part or to the legal representative of his estate.

(c) If the said hospital building shall be constructed and outfitted at a cost less than Three Hundred Thousand Dollars (\$300,000), the trustee shall turn over the difference between this sum and Three Hundred Thousand Dollars (\$300,000), to the trustees of the Chester County Hospital, the same to be invested by them as endowment fund, the income from which to be available for the maintenance of said hospital.

(d) In the event that the income from this trust-fund is insufficient to speedily meet the payments due for the construction and outfitting of said hospital building, the trustee is hereby empowered to borrow such sums as may be necessary to meet these payments, pledging all or any part of the trust-fund as collateral to secure such loan or

loans, and he shall further in his discretion be empowered to sell a portion of the trust-fund to meet such payments.

IN CONSIDERATION of the premises and the mutual promises and covenants hereinbefore promised to be kept and performed, the party of the second part hereby accepts the within trust, subject to all the conditions, restrictions and limitations thereunto belonging or in any wise appertaining, and hereby expressly covenants and agrees that he will in all things faithfully discharge the duties of trustee as aforesaid.

IN WITNESS WHEREOF, the said parties hereto have hereunto set their hands and seals the day and year hereinbefore written.

Signed, sealed and delivered
in the presence of:

RALPH T. ELLIS

PIERRE S. DUPONT (SEAL)

H. RODNEY SHARP (SEAL)

STATE OF DELAWARE
NEW CASTLE COUNTY } ss.

BE IT REMEMBERED, that on this 30th day of November, A. D. 1918, personally came before me, G. D. Hopkins, a Notary Public in and for the State and County aforesaid, Pierre S. duPont and H. Rodney Sharp, parties to this Indenture, known to me personally to be such, and severally acknowledged this Indenture to be their deed.

GIVEN under my hand and seal of office the day and year aforesaid.

G. DARE HOPKINS
Notary Public

EXHIBIT "P."

DEED OF TRUST

for

DELAWARE SCHOOL AUXILIARY FUND

THIS AGREEMENT made this 29th day of July A. D. 1919, by and between Pierre S. duPont of the City of Wilmington, County of New Castle and State of Delaware, of the first part and Irene duPont of the County of New Castle, State of Delaware, John J. Raskob and William Winder Laird, of the County and State aforesaid, parties of the second part.

WITNESSETH:

WHEREAS, said Pierre S. duPont desires to assist in improving the free public schools of the State of Delaware and is willing to provide funds in the amount of Two Million Dollars (\$2,000,000) towards the payment of part of the cost of ample, appropriate and suitable school grounds, school buildings and the equipment thereof.

AND WHEREAS, the Delaware School Auxiliary Association, a corporation of the State of Delaware, is empowered, inter alia, as follows:

"As the beneficiary or cestui que trust to be named in a Trust Agreement, thereafter to be made, between Pierre S. duPont of the one part, and Irene duPont, John J. Raskob and William Winder Laird, Trustees, of the other part, (under which Trust Agreement Two Million Dollars will become payable to this corporation or to other beneficiaries as therein provided) to demand, receive, sue for, recover and compel the payment of all sums of money due and payable to 'Delaware School Auxiliary Association', a corporation of the State of Delaware, under the said Trust Agreement."

Exhibit "P" of Stipulation of Facts

"To join in and enter into contracts made by the County School Boards in Delaware and by the Boards of Education of Special School Districts accepting the 'Delaware School Code of 1919' or by their duly authorized officers and agents, which provide for any of the following: the construction of new school buildings; the remodeling of old school buildings; furnishing appropriate fixtures and equipment for school buildings; purchasing playgrounds, school grounds and school sites; whereby this corporation shall undertake and become bound to pay and thereafter shall pay part of the amount of money agreed to be paid by said Boards under said contracts."

AND WHEREAS, said Pierre S. duPont proposes to transfer securities to the Trustees hereinbefore named, to hold the same for four years, so that the aggregate income from said securities or from other securities exchanged therefor, together with any sums of money realized from the sale or pledge of securities, will aggregate during said period of four years, the total sum of Two Million Dollars (\$2,000,000).

AND WHEREAS, for the better understanding of this Trust Agreement certain of its terms are specifically defined as follows:

"Principal Trust Fund" means the securities transferred by said Pierre S. duPont to the Trustees under this Trust Agreement, whether the original securities or other securities added to such original securities or exchanged or substituted therefor.

"Income" means all dividends, income, profits, gains and benefits arising from the "Principal Trust Fund" and all sums of money realized from Pledging or selling parts of said "Principal Trust Fund", in order to obtain Two Million Dollars for the purpose of this trust.

"Trustees" means the trustees named in this Trust Agreement or any successors of such Trustees.

NOW, THEREFORE, in consideration of the sum of One Dollar (\$1.00), by the said parties of the second part to the party of the first part in hand paid, the receipt whereof is hereby acknowledged, the party of the first part has bargained, sold, assigned, transferred, set over and delivered unto, and by these presents does bargain, sell, assign, transfer, set over and deliver unto the parties of the second part, the following described personal property, to wit:

SHARES	CLASS	COMPANY
14,000	Com.	E. I. duPont de Nemours & Co.
6,000	Com.	General Motors Corporation
2,500	Com.	United Fruit Company
500	Cap'l.	United Cigar Stores

ARTICLE I. The said Trustees shall hold the "Principal Trust Fund" for a period of four years or for such other period as may be necessary, until the Trustees shall obtain in the aggregate Two Million Dollars (\$2,000,000) as "Income" and upon the expiration of said period of four years, the said Trustees shall bargain, sell, assign, transfer, set over and deliver said "Principal Trust Fund" and any other securities or money in their hands, outside of said fund of Two Million Dollars (\$2,000,000) to said party of the first part or to the legal representative of his estate.

ARTICLE II. The said Trustees shall have the power and authority solely in their discretion, to exchange all or any part of the personal property and securities herein above specifically set out for other securities, or to sell the same and reinvest the proceeds in other securities, such reinvestments to be subject to all the terms and conditions of this Trust.

ARTICLE III. The said Trustees shall administer the Trust relating to said "Income" as provided in this Trust Agreement for a period of seven years, unless said "Income" shall be exhausted at an earlier date, and upon the expiration of said period of seven years, said Trustees shall

assign, transfer, pay over and deliver any part of said "Income" then remaining unadministered in their hands to Delaware College, an Educational corporation of the state of Delaware.

ARTICLE IV. The said Trustees shall have the power and authority to raise money not exceeding in amount Five Hundred Thousand Dollars (\$500,000) towards said sum of Two Million Dollars (\$2,000,000) by selling part of said "Principal Trust Fund" and by borrowing sums of money by pledging part of said "Principal Trust Fund".

ARTICLE V. The said Trustees shall collect and receive said "Income" aggregating Two Million Dollars (\$2,000,000) and from time to time, during said period of seven years, shall pay over said "Income" to Delaware School Auxiliary Association, a corporation of the State of Delaware, in sums of money as follows:

(1) The said Trustees shall pay over sums of money to said Delaware School Auxiliary Association upon the written order of its President and Secretary, or upon the written order of any two of the officers or trustees of said association, stating that such money is necessary to enable Delaware School Auxiliary Association to meet its obligations as a party to contracts made by County School Boards in Delaware, or by Boards of Education of Special School Districts accepting "Delaware School Code of 1919" and that further stating that such contracts provide for one or more of the following: the construction of new school buildings; the remodeling of old school buildings; furnishing appropriate fixtures and equipment for school buildings, playgrounds, school grounds or school sites.

(2) The said Trustees shall pay over sums of money to said Delaware School Auxiliary Association upon the written order of its President and Secretary, or upon the written order of any two of the officers or trustees of said

association, stating that it was necessary to expend the particular sum of money requested in said order for either of the following objects:

To direct and develop public sentiment in support of public education in Delaware; and the need of new school grounds, buildings and equipment.

To conduct investigations relating to the educational needs of the State and the means of improving educational conditions.

The said Trustees shall not be liable for the application, mis-application or non-application of the sums of money so paid as above.

ARTICLE VI. It is hereby expressly covenanted and agreed that the due administration, performance and execution of the Trust created by this Trust Agreement shall not require the joint action of all three Trustees, but that the joint action of any two of said Trustees shall in all cases be lawful and sufficient.

ARTICLE VII. Upon the death, incapacity or refusal to act of any of said Trustees, Laniot duPont of Christiana Hundred, New Castle County and State of Delaware and H. Rodney Sharp of the City of Wilmington and State of Delaware, in order named, are hereby appointed to the Trusteeship, with all the powers and subject to all the conditions, restrictions and limitations of this Trust.

IN CONSIDERATION OF THE PREMISES and the mutual promises and covenants hereinbefore promised to be kept and performed, the parties of the second part hereby accept the within trust, subject to all the conditions, restrictions and limitations thereunto belonging, or in any wise appertaining, and hereby expressly covenant and agree that they will in all things faithfully discharge the duties as Trustee aforesaid.

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals, the day and year hereinbefore written.

Signed, sealed and delivered in the presence of:

F. A. McHugh as to	Pierre S. duPont	(SEAL)
P. S. duPont		
Sophie E. Baird	Irenee duPont	(SEAL)
F. A. McHugh as to	John J. Raskob	(SEAL)
J. J. Raskob		
Ralph T. Ellis as to	William Winder Laird	(SEAL)

STATE OF DELAWARE }
NEW CASTLE COUNTY } ss.

BE IT REMEMBERED that on this first day of August A.D. 1919, personally came before me, G. D. Hopkins, a Notary Public for the State of Delaware, Pierre S. duPont, Irene duPont, John J. Raskob and William Winder Laird, parties to this indenture, known to me personally to be such, and severally acknowledged this Indenture to be their Deed.

GIVEN under my hand and seal of office the day and year aforesaid.

G. D. HOPKINS,
Notary Public (SEAL).

EXHIBIT "Q."

IRÉNÉE DU PONT
Wilmington
Delaware

March 10, 1921.

Mr. P. S. duPont,
Building.

Dear Pierre:

After your talk with me on the subject of your embarrassment with regard to the sale of 1000 shares duPont stock to each of the Executive Committee at \$320. a share, which sale has proven (on paper at least) very disadvantageous to the Committeemen, and knowing that some of these men are materially disturbed over their financial situation, I outlined Plan "B" attached, and have discussed it with Lamot, Bill Spruance and Walter Carpenter, particularly to determine whether the Committeemen would take the position that no adjustment could be honorably made by them, in that it would put them in the position of squealing because they had made a bad bargain.

I feel sure that their feeling was that it would be unethical for them to ask for a modification of the contract but have argued that where two partners make an agreement which becomes distasteful to both sides, it is clearly good sense and good business to modify the contract to some mutually desirable form, and I now feel sure that all would assent to a modification if they felt sure that it came from you, and that the modification would eliminate embarrassment which you might have in the matter.

Apart from this, I am confident that it is unfortunate that a number of our important men have a financial worry on their hands to distract them, however little, from applying their utmost energy on the company's affairs.

It may seem rather "cheeky" of me to suggest Plans "C" and "D", which were evolved in discussion with Lamot and Spruance, largely to effect a net result which Spruance had in mind; to wit, that if the bargain, including the

extra compensation, had never been made his mind would be more free from worry and he would be in the best possible condition to give all his time and thought to the company's affairs. He mentioned that in going into the proposition he only did so to keep with the crowd, but desirous that his peace of mind be not disturbed, either by loss on the one hand or profits which "he did not deserve" on the other. Bill is peculiar in his desire to avoid all types of speculation, and I recall that he was rather loath to enter into the original arrangement and feel sure he only did so to avoid appearing to show lack of faith in the company.

Consideration of this matter for all members of the Executive Committee may solve the problem put up to me by the Finance Committee in finding a solution in Don Brown's case. If he is in the same temper as Spruance the problem would be eliminated by the same treatment. If he desires a speculation in General Motors, that could be arranged in place of purchase of Christiana Securities stock under Plan "B".

I have invited Dr. and Mrs. Eyde to go down to Hot Springs with me for the first half of next week. I hope that they will not accept, but feel that I am under a considerable obligation to them for the many kindnesses while Irene was sick in Norway, and feel that it is up to me to do something.

Your affectionate brother,

IRÉNÉE DU PONT.

IduP/R

7

SITUATION "A"

Each Executive Committee member purchased 1,000 shares duPont Common at \$320. The duPont Company loaned each \$320,000. at 5% due December 31, 1924. The duPont Company agreed to pay as extra compensation, under certain conditions outlined in the contract, \$150,000 on December 31, 1924.

Stock dividends received on the 1000 shares, three at 2½% each, have increased the number of shares to, say, 1076. The present market price of the stock is 140., making the worth of the collateral \$150,640. Each Executive Committeeman has lodged \$150,000. insurance as an additional collateral. The present worth of the policy is negligible.

Assuming that each continues his employment during the full term, and the note is reduced by \$150,000. thereby, still

the collateral is [^]insufficient. If such employment is not completed, the collateral is very insufficient.

From the Committeemen's point of view, each has made a bad bargain.

From the Company's point of view, the bargain was a bad one, because certainly a majority of the Committeemen are more or less disturbed over their financial condition which shows a paper loss of \$169,360., neglecting interest which has exceeded cash dividends received.

The seller of the stock to the Committeemen, being of the nature of a senior partner in the enterprise, is disturbed from having been inadvertently placed in a position of profiting at the expense of his junior partners.

As possible revisions of the arrangement, the following have been suggested:

SITUATION "B"

Have the duPont Company offer to each Committeeman to accept a note due December 31, 1924 for \$150,000. without interest, provided he will liquidate in cash the balance of his indebtedness forthwith, in which case the duPont Company will return to the borrower the duPont Common stock which he has placed as collateral on his present note, retaining as the only security for the payment of the note—

1. The insurance policy already in its possession,
2. As assignment, if need be, of any interest he may have in the \$150,000. contingent compensation payment.

The Christiana Securities Company offer to purchase from each Executive Committeeman the 1076 shares of duPont stock, paying therefor an amount equal to the difference between the original cost, \$320,000., and the \$150,000. note, say, \$170,000., plus an amount which equals the excess of interest paid the duPont Company over the cash dividends received on the stock during the period when the Executive Committeemen held the same, provided that at the same time the Executive Committeeman purchase from the Christiana Securities Company new stock of that company to the extent of 200 shares at \$400. per share, paying therefor with his note for \$80,000. at 6% interest due December 31, 1924 and lodging as security for the payment thereof, the stock so purchased plus an additional amount of 200 shares referred to below.

Christiana

P. S. duPont to give 200 shares duPont Securities stock to each member which, assuming that duPont stock is worth \$156. a share, is the equivalent of return of \$80,000. of paper profit which he made from the original transaction.

SITUATION "C"

Mr. P. S. duPont, with or without others give to each Executive Committeeman 400 shares Christiana Securities Company stock which, if duPont stock is worth \$156., is the equivalent of a gift of \$160,000., representing approximately the paper profit which he obtained from the original transaction, each Committeeman to lodge this additional 400 shares as collateral on his note with the duPont Company which would make the collateral reasonably ample to cover the loan.

SITUATION "D"

Proceed as per "C" with the addition that it would be provided that Committeemen desirous of not speculating in the securities at the attractive price which would then result, would authorize the duPont Company to sell to the Christiana Securities Company the securities held as collateral for the net amount of the note and, at the same time, cancelling that clause of their employment agreement by which they are paid extra compensation for the five years ending December 31, 1924.

March 9, 1921.

EXECUTIVE COMMITTEE:—

In December 1919 you entered into a contract under which you were to receive extra compensation from the DuPont Co. provided you remained five years in a position with the DuPont Company, outlined in that contract, and at the same time acquired 1000 shares of DuPont common stock.

We look upon the stock purchase phase of this contract as an agreement between partners. We consider it very different from a cold-blooded contract with an outsider. It is to our personal advantage that junior partners should not be embarrassed and distracted in the performance of their duties by reason of an arrangement made between partners

which proved disadvantageous to both, due to unforeseen contingencies.

We think the time opportune for changing this agreement between partners and contingent on the liquidation of the purchase of the shares of DuPont stock above referred to, we offer to sell you 400 shares stock of the Christiana Securities Co. for \$80,000 taking therefor your note @ 6%.

March 9, 1921.

EXECUTIVE COMMITTEE:—

You purchased about a year ago 1000 shares of DuPont common. To this there has been added three stock dividends at $2\frac{1}{2}\%$ each. This is to offer you..... for this block of stock, which amount is arrived at by tak-

& adding
ing \$170,000 plus the excess of interest carrying charges over

and cash dividends received since you purchased it a little over a year ago. This offer is made with

the understanding that you are about to acquire an interest in this company, which represents approximately the same

at least as much
are
equity in the DuPont Company as your stockholdings which we offer to purchase.

CHRISTIANA SECURITIES COMPANY

March 9, 1921.

EXECUTIVE COMMITTEE MEMBERS:—

In view of our shortage of cash, the DuPont Co. makes you the offer that if you will pay your note of December 31, 1919, with interest, to date, we will accept in ^{part} payment therefor, your note for \$150,000. without interest, due December 31, 1924, secured by an assignment from you that you the extra cash payment be made at that time to you under your employment contract.

E. I. DU PONT DE NEMOURS & Co.

Assets 12/31/20 Christ. Sec. Co. ex. du Pont	
Com. =	5,392,956.90
Add \$4 per share du Pont chain to give market	650,184
	<hr/>
	6,043,130.90
Less depreciation of newspaper stock say	409,414.23
	<hr/>
Adjusted assets other than du Pont stk.	5,633,716.67
Liabilities other than stock & surplus	6,383,716.67
	<hr/>
Excess of Liab. over value of "quick" assets	750,000
= \$10 per share	
Present d. P. stock holdings 197,070 shrs.	
156.04	30,750,000
valued at 160 =	31,531,200
	<hr/>
	410
= per share of capital =	429,416 750,000
less above	10
	<hr/>
Net worth based on \$160 d. P. 400.00 or	

Exhibit "S" of Stipulation of Facts

Sell Ex C. each 200 shrs for	80,000	=	720,000
Add as sweetner 200 " "	0		
<hr/>			
Cost & Ex C. for 400	80,000	= tot	720,000
Int on note @ 8% =	\$4,800		
Income from stock @ \$20 du =	8,000		
<hr/>			
	3,200		
Sec Co pay 170,000 x 9 =	1,530,000		
	3,180		
<hr/>			
	1,650		

EXHIBIT "R."

[Omitted here by consent, being reproduced in full in paragraph 24 of the Findings of Fact of the District Court.]

EXHIBIT "S."

THIS AGREEMENT made this 25th day of October, A. D. 1929, by and between **DELAWARE REALTY AND INVESTMENT COMPANY**, a corporation of the State of Delaware, and **PIERRE S. DU PONT**, of the City of Wilmington, State of Delaware,

WITNESSETH:

WHEREAS on or about December 23, 1919, Pierre S. duPont sold certain shares of the common stock of E. I. du Pont de Nemours and Company, making delivery thereof in shares of said common stock borrowed for the purpose from Christiana Securities Company, a corporation of the State of Delaware, under an agreement to return said shares so borrowed within ten years from said date; and

WHEREAS at the date hereof said Pierre S. duPont, under said agreement with Christiana Securities Company,

is indebted to said Christiana Securities Company in the total amount of 142,212 shares of the Twenty Dollar par value common stock of E. I. du Pont de Nemours and Company, and, while not at this time contemplating the closing of the short sale transaction of December, 1919, desires to return to Christiana Securities Company the amount of shares owing to it in accordance with the provisions of said agreement by borrowing said number of shares elsewhere; and

WHEREAS Delaware Realty and Investment Company is the registered owner of shares of the common stock of E. I. du Pont de Nemours and Company in excess of the number of shares required by Pierre S. duPont, to repay said loan, and, at the request of Pierre S. duPont, is willing, upon the terms and provisions hereinafter set forth, to loan to said Pierre S. duPont the shares needed to repay said loan to Christiana Securities Company:

Now, THEREFORE, in consideration of the premises, it is agreed between the parties hereto as follows:

1. Delaware Realty and Investment Company will loan to Pierre S. duPont one hundred forty-two thousand, two hundred twelve (142,212) shares of the Twenty Dollar par value common stock of E. I. du Pont de Nemours and Company, which said number of shares plus any increase thereof by stock dividend or otherwise, said Pierre S. duPont agrees to return to Delaware Realty and Investment Company in kind, within ten (10) years from the date of this agreement.

2. Currently with the delivery of certificates representing said one hundred forty-two thousand, two hundred twelve (142,212) shares of said common stock, duly endorsed so as to enable said Pierre S. duPont to have the same transferred upon the books of E. I. du Pont de Nemours and Company, said Pierre S. duPont shall deliver to Delaware Realty and Investment Company, together with necessary assignments and powers of attorney

to effectuate the transfer thereof to Delaware Realty and Investment Company, certificates representing seven thousand, three hundred twenty (7,320) shares of the Preferred capital stock and seven thousand, three hundred and twenty (7,320) shares of the Common capital stock of Christiana Securities Company, to be held by Delaware Realty and Investment Company as security for the return of said shares of common stock of E. I. du Pont de Nemours and Company so borrowed.

3. All cash and property dividends declared and paid upon the shares of stock of Christiana Securities Company on deposit as collateral security with Delaware Realty and Investment Company, shall be paid to Pierre S. duPont if, as and when received by Delaware Realty and Investment Company, and an amount equivalent to all cash and property dividends declared and paid on said one hundred forty-two thousand, two hundred twelve (142,212) shares of common stock of E. I. du Pont de Nemours and Company, so borrowed, plus any increase thereof by stock dividend or otherwise, or upon any balance of said shares which may be owing under this agreement to Delaware Realty and Investment Company, as the case may be, shall be paid by Pierre S. duPont to Delaware Realty and Investment Company as and when said dividends are declared and paid by E. I. du Pont de Nemours and Company.

4. In the event of the declaration and payment of a stock dividend or dividends upon the shares of Christiana Securities Company on deposit with Delaware Realty and Investment Company to secure said loan of shares of E. I. du Pont de Nemours and Company, such stock dividend shares shall be deposited by Pierre S. duPont with Delaware Realty and Investment Company, together with assignments and powers of attorney to effectuate the transfer thereof to Delaware Realty and Investment Company, which stock dividend shares shall be held by Delaware Realty and Investment Company as additional security for

the return of said shares of common stock of E. I. du Pont de Nemours and Company so borrowed. In event of the declaration and payment of a stock dividend or dividends upon the shares of common stock of E. I. du Pont de Nemours and Company so borrowed, or upon any balance of said shares which may be owing under this agreement to Delaware Realty and Investment Company, as the case may be, an amount of shares equal to such dividend shares so declared and paid shall, as of the date of payment thereof, become additional liability of Pierre S. duPont to Delaware Realty and Investment Company hereunder, and shall be and become subject to the same terms and conditions of this agreement applicable to the original shares of common stock of E. I. du Pont de Nemours and Company so borrowed.

5. During the existence of this agreement should any rights to subscribe to stock of any kind be issued by Christiana Securities Company on the shares of Christiana Securities Company deposited with Delaware Realty and Investment Company to secure said loan of shares of E. I. du Pont de Nemours and Company, certificates representing such rights to subscribe, if issued in the name of Delaware Realty and Investment Company, shall be promptly assigned and transferred to Pierre S. duPont for disposition in such manner as he may deem proper.

During the existence of this agreement should any rights to subscribe to stock of any kind be issued by E. I. du Pont de Nemours and Company on the shares of common stock of E. I. du Pont de Nemours and Company so borrowed, or upon any balance of such shares which may be owing under this agreement to Delaware Realty and Investment Company, as the case may be, an amount in cash equal to the opening market price of such rights on the date when such rights are issued shall be promptly paid by Pierre S. duPont to Delaware Realty and Investment Company.

6. During the life of this agreement Pierre S. duPont shall have the option to reduce or extinguish his indebtedness to Delaware Realty and Investment Company hereunder by the return to Delaware Realty and Investment Company of the shares owing to it in such amounts and at such times as the said Pierre S. duPont may desire. Upon any such reduction of the indebtedness of shares owing to it, Delaware Realty and Investment Company will, if requested so to do, release to the said Pierre S. duPont such number of shares of Christiana Securities Company on deposit with it to secure said loan as it may determine is not needed or desired to amply secure the return to it of the remainder of said shares owing to it. Upon the delivery to Delaware Realty and Investment Company of certificates representing all shares of common stock of E. I. du Pont de Nemours and Company which shall be owing to Delaware Realty and Investment Company under this agreement, duly endorsed, said Delaware Realty and Investment Company shall return to Pierre S. duPont all shares of Christiana Securities Company on deposit with it to secure said loan of shares of E. I. du Pont de Nemours and Company.

7. Should any lawful tax liability, Federal or State, accrue against and be paid by Delaware Realty and Investment Company, which liability, but for the execution of this agreement, otherwise would not so accrue. Pierre S. duPont agrees, upon being notified thereof, to reimburse Delaware Realty and Investment Company for all such taxes which may be lawfully assessed and paid by Delaware Realty and Investment Company, together with interest and penalties that may be levied or imposed in respect of any such taxes lawfully assessed and paid. Should any taxes of any kind accrue or be levied or assessed against Delaware Realty and Investment Company, which taxes but for the execution of this agreement otherwise would not so accrue or be levied or assessed, and such taxes

in the opinion of Pierre S. duPont are unlawfully assessed or levied, Delaware Realty and Investment Company will, if requested by Pierre S. duPont so to do, contest the validity of such taxes in any manner deemed appropriate by Pierre S. duPont, but at the expense of the said Pierre S. duPont.

8. The provisions of this agreement shall inure to and be binding upon the successors, heirs, executors, administrators and assigns of the parties hereto.

IN WITNESS WHEREOF Delaware Realty and Investment Company has caused these presents to be executed by officers thereunto duly authorized, and sealed with the seal of the corporation, and Pierre S. duPont has hereunto set his hand and seal, this 25th day of October, A. D. 1929.

DELAWARE REALTY AND INVESTMENT COMPANY

By IRÉNÉE DU PONT Y. P.
PIERRE S. DU PONT (SEAL)

Attest:

HENRY B. DU PONT

Asst. Secretary.

FRANK A. McHUGH

Pierre S. du Pont, the plaintiff above named, for the purpose of further maintaining the issues on his part, offered the following testimony and exhibits, to wit:

OPENING STATEMENT FOR PLAINTIFF.

MR. JAMES S. Y. IVINS: If the Court please, we have today the case of Pierre S. du Pont, plaintiff, against Willard F. Deputy, Collector of Internal Revenue, defendant.

It is a suit for the refund of income taxes for the year 1931, alleged to have been overpaid.

In the pleadings two issues were raised; one of them closed up by stipulation which reduces the issues to one; and indicates to the Court that if the judgment on that one is in favor of the defense, there will still be a judgment of some \$54,000 to be entered in favor of the plaintiff because of the stipulated issue. We ask that this stipulation be filed.

THE COURT: Mr. Morris, you are familiar with it, and have signed the stipulation?

MR. J. J. MORRIS, JR.: Yes, I have, sir.

MR. IVINS: In order to shorten the trial and eliminate the necessity of calling witnesses for the identification of numerous documents, it has been possible for the parties to get together and make a stipulation covering certain formal facts, and identifying all, or a greater part of the documentary evidence; so that it will not be necessary to put witnesses on and identify them. The original of the stipulation is here; and while, of course, the parties have reserved the right to object to these documents, on the ground of immateriality, I think in practically every instance, there may be one or two instances of objection, but practically that is the only objection that will be made.

I think it might be desirable for the Court to have that stipulation before it, as we go through the trial (handing).

THE COURT: Very well.

MR. IVINS: This is an action to recover income taxes alleged to have been overpaid for 1931. The collection was based on a deficiency in tax, asserted by the Commissioner of Internal Revenue of \$142,466.79, which was assessed, and in September of 1935, paid with interest of \$29,884.85.

THE COURT: What year was that? Please let me have that again.

MR. IVINS: For the year 1931. The Commissioner determined this deficiency in 1935, whereupon it was paid and claim for refund was promptly filed, and after the expiration of the six months period this suit was begun, the Commissioner not having acted on the claim for refund.

There were, as I said, originally two issues, but one of them has been disposed of by the first stipulation filed, which entitles the plaintiff to judgment of \$54,439.52 on that item. The balance is in dispute on the second litigated issue. This litigated issue is whether the Commissioner of Internal Revenue acted properly in disallowing a certain deduction from gross income, in a computation of the plaintiff's net income for 1931.

That deduction was of amounts which Mr. du Pont had paid to the Delaware Realty Company, under circumstances that will be developed later on. He owed the Delaware Realty Company a lot of stock, du Pont stock; and I might say that throughout this trial it will probably be easier for all concerned, if we refer to the E. I. du Pont de Nemours Company as the "du Pont Company," as it is the only du Pont Company that comes into this picture.

Mr. du Pont had borrowed or taken stock for the purpose of selling it; and under the contract by which he had borrowed it, he was obliged to pay to the lender the equivalent of any dividends that were declared by the company on the stock during the period of the loan.

The history of the transaction runs away back to 1919. Around the first of May, 1919, Mr. Pierre S. du Pont, the plaintiff, had retired as president of the du Pont Company, and become chairman of the board. At that time he was

directly or indirectly the owner of more than one-sixth of all of the stock of the du Pont Company. He had only a small block of stock directly in his name, I think it was only seventy-four shares; but he was the owner of a very large block of stock of the Christiana Securities Company, which, in turn, was the largest stockholder of the du Pont Company. He also was the grantor and reversioner under two trusts. He had created a trust of 10,000 shares of du Pont stock for the benefit of a charity, the trustee to hold the stock, to collect the dividends until the purpose of the charity had been accomplished. A certain amount of money had been raised for a school and a hospital, and for the return of the corpus of the trust to Mr. du Pont, and he had similarly placed 14,000 shares in another trust; so that he expected the return of 24,000 shares from these trusts within a reasonable period of years, and he also, through his ownership of Christiana Securities Company stock, was greatly interested in the du Pont Company. As I say, he was the largest individual stockholder, equitably.

In the light of the policy that he had more or less adopted for many years before, he believed it desirable to tie into the company the valuable men they had, as employees or executives. During the war, the company had a bonus plan, by which they gave employees bonuses in stock of the company, to make their interest and the company's interest, the same; and they used to pay employees bonuses under that plan, in stock.

After the war, the nature of the du Pont Company's business changed completely. They had been manufacturers of explosives. At the termination of the war, the demand of explosives disappeared; and it was soon decided that they would go into other and different lines of business.

For that purpose it was thought desirable to make sure of retaining the services of nine men, who had been placed in important key positions, and who constituted the executive committee of the corporation.

It was suggested that something be done to make a special bonus plan, to give them a material interest in the

welfare of the company, aside from any salaries they might be drawing, and to hold their services that way, so that they might not go out as competitors; and the suggestion was made about the first of May, by Mr. Pierre S. du Pont to the finance committee of the du Pont Company, that something should be done along this line.

This resulted in the appointment of a special sub-committee of the finance committee, which made inquiries and investigations, and from time to time during the summer reported progress and asked for further time.

At last, in November, the sub-committee brought in a report recommending that the du Pont Company, the corporation, issue 1000 shares of stock to each of those nine executives, and enter into contracts with them for certain salaries, and certain bonuses at the end of five years, if they should remain in the service.

THE COURT: Pardon me; each of those nine men to receive 1000 shares of stock of the du Pont Company?

MR. IVINS: That is right.

THE COURT: You were just coming to the bonus provision, in addition to that?

MR. IVINS: Yes. The bonus they were to receive was to be applied in payment of the thousand shares.

The idea was that the stock would be issued to them so that they would be able to vote it; but I think the details of it show that the dividends would be accumulated against the price of it which was charged to them, and their bonus which they would get at the end of five years, would apply against the balance, if it had not been paid in the meantime.

That plan was not accomplished, because counsel advised that under the Delaware law, it would not be proper for the corporation to issue stock for anything but property received, or cash, or services rendered; and this issuance of stock in advance of services rendered was felt improper, so that it appeared they could not carry it out that way.

The question then came up: "What can we do about it?" It was decided that Mr. Pierre S. du Pont, as the largest individual stockholder, and having great material interest in promoting the welfare of the company, and its having been his idea that these executives should be tied up to the company in this way, that he would sell 1000 shares of stock to each, and the company would lend the money to buy it with, they getting the stock as collateral for the loan.

THE COURT: Will you restate that to me again?

MR. IVINS: Mr. du Pont was to sell them each 1000 shares of stock. In order to pay for it they were to borrow the money from the company, putting up the stock as collateral, and they would also take out life insurance for \$150,000 apiece, which would be the equivalent for the bonus each one would earn for the five-year period as bonuses, to be applied as far as necessary, for payment of the balance that might be due on the stock at the end of five years.

That seemed to be a good scheme; but the only trouble was that Mr. du Pont only had seventy-four shares of stock in his own name. He had 24,000 shares in these trusts that I spoke of, that would be coming back in a year or two, or three years. Nobody could tell exactly, because it depended how fast the company paid dividends; and he had, of course, indirectly, ownership through the Christiana Securities Company, in an enormous block of stock; but he could not get that out of the Christiana Securities Company.

The Christiana Company was not interested in selling du Pont stock; it was buying du Pont stock. That was what it was there for, to own it and hold it.

However, the board of directors of the Christiana Company were satisfied that this plan of making large stockholders of its executives was a good thing for their interest as a stockholder of the du Pont Company; so that they were willing to lend Mr. Pierre S. du Pont 9000 shares of du Pont stock for the purpose of letting him sell it to the nine executives. The Christiana Company lent him 9000

shares, and he posted collateral to secure that loan, the collateral he posted being the stock of the Christiana Company originally, and later on, other collateral was substituted at different times; but he had a collateral loan of 9000 shares of stock.

Under the contract by which he borrowed that stock, he was, of course, to make good to the Christiana Company any dividends that it would have received if it had retained the stock in its own name; and he treated those payments which he had to make to the Christiana Company each year as deductible from his gross income; and whether on the theory that they were the ordinary and necessary expenses of carrying on business; whether he regarded them as rent or interest, it does not appear; because it is just put down among other deductions on the tax returns or lumped in with the interest deduction.

THE COURT: The dividends on the stock itself was for the benefit of the nine men, being retained as part of that fund for the nine men, is that correct?

MR. IVINS: That is correct; those dividends on the stock. The stock was transferred on the books of the company into the names of those nine men, and the dividend checks were either spent by them or applied to the debt to the company. They had paid Mr. du Pont cash, and now he deducted those payments each year on his income tax return.

For eleven years that was satisfactory to the Government. They raised no point with respect to it. In fact, when the 1931 return, the one with which we are concerned was being audited, the revenue agent not only allowed the deduction for interest, but increased it by some \$80,000, for the taxes that Mr. du Pont had had to pay for the lending company.

Now, I missed a point in there, your Honor.

This first contract with the Christiana Company was for a period of ten years. When those ten years were up, Mr. du Pont had not yet returned the stock to the company.

For reasons of his own, he had decided it was better to let the loan run, and pay equivalent dividends to the company, than it was to acquire the necessary stock to cover it, even though some stock came back to him from the trustees. Apparently at the time he got it back, he had other uses for it, or was not interested in it. He did not close up that indebtedness but let it run until the end of its ten-year period.

Then the question came up—what is to be done? It was decided that he would borrow enough stock from the Delaware Realty Company, which was another holding company, that held a lot of stock in the du Pont Company, and a lot of Christiana stock.

During those ten years the du Pont Company had declared not only cash dividends, which Mr. du Pont had made good to the Christiana Company, but had declared stock dividends. Whenever it declared a stock dividend, of course his obligation to return 9000 shares of stock had to be increased to cover the equivalent of the stock dividend; and each time there was a stock dividend a supplemental contract was signed between Mr. du Pont and the Christiana Company, increasing his liability in stock, and restating it.

So that by 1929, the obligation to return stock, having gone up in almost geometrical progressions, had gone from 9000 shares to 142,000 shares.

Of course, those new shares were not quite as valuable as the old shares had been; but in the aggregate were much more valuable than the original 9000 shares.

Somewhere along in the picture—I do not know the date, or whether it is important—but anyhow, before the transaction with the Delaware Realty Company, the Government had ruled that the payments received by the Christiana Company from Mr. du Pont, were not to be treated as corporate dividends, which would have been exempt from another corporation, but as income from other sources which would be taxable.

So that it appeared that the Christiana Company was on the short end of things, if it had to pay taxes on this money it received; and that the only fair thing was to have Mr. du Pont, if he wanted to keep that account open, also to pay those taxes.

To meet this new contract in 1929, with the Delaware Realty Company, under which he borrowed from the Delaware Company enough du Pont stock to satisfy his obligations to the Christiana Company, he made a new contract with the Delaware Realty Company, providing that he would pay the equivalent of all dividends on that, and furthermore any taxes that the Delaware Realty Company might have to pay by reason of the receipt of those payments.

In 1934, the revenue agent audited Mr. du Pont's return and allowed the deduction of the amount of the dividends that had been paid, and also allowed as deduction \$80,000 owed for the taxes. Now, Mr. du Pont did not claim that on his return, but the revenue agent indicated it was part of the same transaction and allowed it.

THE COURT: Prior to that time, preceding the years 1933 and 1932, and so on, Mr. du Pont also had paid that sum which was due by way of income tax, or allegedly due by way of income tax, upon those dividends of du Pont stock; had he claimed them in those years too?

MR. IVINS: He had not. He did not claim them until 1934, until the revenue agent pointed out it was a proper claim and allowed it.

The revenue agent's action is a mere recommendation; we do not claim it was final or binding on the Commissioner of Internal Revenue. It was undoubtedly based on the fact that for the eleven previous years, the audits had been closed with those deductions allowed.

Then between the time the revenue agent's report was filed and the time it was finally closed, in the Bureau of Internal Revenue, the Board of Tax Appeals handed down a decision in the Dart case, in which it held that where a

dealer or trader, who sold securities short had paid the equivalent dividends to the people who had lent the stock to be sold, the Board held that he could not deduct those payments from current income for the year in which the income was paid, but should accumulate them until he closed up the transaction by covering the short sales, and then treat them as part of the cost price of closing the transaction.

THE COURT: Might I ask you to go over that again, sir?

MR. IVINS: In the ordinary short sale—I will try to distinguish our case later—in the ordinary short sale, the man who thinks that speculative stock is likely to go down, sells it first in the hope that he can buy it back cheaper later on; he sells something he does not have. Under the rules of the Stock Exchange and the statutes in most of the states, you are not allowed to sell something you have not got, and make a promise for delivery on an uncertain date in the future.

It has been legislated that way because there was too much plain gambling in what we used to call "bucket shops." So under the rules of the Stock Exchange, if a man sells stock, he has to make delivery the next day.

If I tell my broker to sell 1000 shares of steel for me, I have to supply him with a sufficient margin to satisfy him that he is not going to lose by the transaction, and then he will go on the Exchange and make his offer to sell; and if it is matched by a bid for the same price, he will hand over the ticket for the sale, and he makes delivery. He takes 1000 shares of steel stock out of accounts of some of his other customers. Those customers have margin accounts with him, and any stock he buys for his name, or what we call the "street" name, that is, it is endorsed in blank, so that it is readily negotiable; he borrows that stock from the original owner of it and makes delivery on my sale. Of course, the real owner expects the dividends received on that stock. So the broker credits him with those

dividends and charges them to me. He also credits me with interest on the money he got from the sale of the short stock. He has gone out and sold stock for my account and credited me with the small interest on that money I am lending him, and he is holding his collateral in case the stock goes up or down.

Now, after a time, I may be satisfied with a profit or a loss, and I will instruct him to close the transaction. Whereupon, he goes in the market and buys 1000 shares of stock, which he puts back into the box of the customer from whom he borrowed it, and that customer may not know all that was going on.

When he opens a margin account, he has to consent to that kind of thing with his accounts. So that all the stocks held as collateral in brokers' offices, are subject to just that. In some instances they get the consent of the stockholders, but mostly it is not even known.

Now, in the Dart case, the petitioner was charged with dividends on stock he had sold short, the money being credited to the lenders of that stock, and he deducted the amounts of those charges from his net income in the year in which the charges were made against him.

The Board of Tax Appeals held: "No, that is part of the purchase price of the short stock, and you just add that to the purchase price at which you cover when you close the transaction."

In the light of that Dart decision, and citing it, the Commissioner of Internal Revenue reversed the action of the Collector; and, in effect, overruled what had been done for the previous eleven years and said: "If that is true in the Dart case, then in Mr. du Pont's case, he should not be allowed to deduct this currently, but should accumulate it until he finally closes out the transaction."

Then the Circuit Court of Appeals of the Fourth Circuit reversed the Board in the Dart case, and said that should be a current deduction and not accumulated until the end.

There is also a case in the Second Circuit which goes the other way, but on a slightly different type of transaction.

In that case, the short seller was not a regular trader, and it was just an isolated transaction that began shortly before the end of the year and ended shortly after the end of the year.

The Second Circuit held that there the dividend that had been charged to him should await the closing of the transaction.

THE COURT: Let me see if I have the ruling of the Board in the Dart case clear? Under the ruling of the Board in the Dart case, one takes the price, that is, the Board requires him to take the price at which he repurchased the stock, and add to it all sums which he has paid by way of dividends to the person from whom that stock was originally borrowed; and he deducts from that the sale price at the time he made his original short sale, and his profit or loss accordingly?

MR. IVINS: Yes.

THE COURT: And the Board does not allow the income to be deductible during the current year in which he repays the dividends from whom he, so to speak, borrows the stock, but requires it to be cast up at the time the transaction is closed?

MR. IVINS: That is the Board's decision.

THE COURT: That was reversed by the Circuit Court of Appeals?

MR. IVINS: Yes.

THE COURT: And then there was another case in the Second Circuit which went off on slightly different grounds?

MR. IVINS: It was different, in that in the Dart case the taxpayer was a trader, doing a large business in stocks, buying and selling; and in the other case, in the Second Circuit, it was an isolated transaction by a man who was

not a regular trader, and it lasted only before the end of the year until shortly after.

We propose to prove that Mr. du Pont was in the business of investing his estate and keeping track of those investments. He had very large and diversified investments in corporate securities; but the great bulk of his estate was in the du Pont Company, either originally or through the Christiana Company. That was the company that was making the earnings on which he was living, and which earnings it was natural to his interest to augment and increase; and in furtherance of his desire to improve that business for his own financial position, he was willing to enter into this transaction.

It had none of the elements of a gift, because the price at which he sold to those nine executives, was certainly as high a price as 9000 shares could have been sold to anybody at that time. The stock of the du Pont Company had not been listed on any exchange. It was all pretty closely held by various members of the du Pont family or their little holding companies; and small amounts were scattered around in the hands of the public; but we find that two or three months before this transaction was consummated, the total number of shares transferred on the books of the company, in a month, would run about around 500 or 600, except for big blocks transferred by one of the du Ponts to a holding company, or to a trustee, or something like that. But eliminating those types of transactions, all the transactions that could have been in the open market, aggregated about 500 or 600 shares a month; and the brokers' accounts, through one brokerage house, Laird & Co., which specialized in the du Pont Company stock, and they could buy those shares there, and their records, we have photostats annexed to the stipulation showing their transaction in that stock, and they showed that the number of shares sold in the stock ran from one share to fifty, but they were all small trades.

Now, the current market at the time this transaction was made, on those tiny little blocks, ran around \$360 to

\$365 a share; but that did not mean that anybody could sell 9000 shares and get that price for it. Nor did it mean that any one could go out and buy 9000 shares and get them for that price, because if an order had been placed with the broker saying, "I want to buy 9000 shares, at whatever you have to pay," he would probably have doubled the price before he got it; and if he said for him to sell, he would probably have pushed the price down to one-third of what it was. That is readily feasible, I think.

The stock itself was very uneasy and unstable on the market at that time. Between the middle of October and middle of November, it jumped 100 points and started down again. Of course those trades were in those little five and ten and twenty share blocks; but when it became time for Mr. du Pont to carry out the ideas that had been involved in borrowing 9000 shares from the Christiana Company, and selling them to the executives, the question arose: "What will be the sale price?"

So we asked the treasurer of the company to make a report on that, and the treasurer figured out the asset value of the stock at \$320 a share, and that report was given to Mr. du Pont, and he gave it to his brother Ireneé, who was president of the company at that time, who handed it around to those nine executives and asked them to look it over and see whether they were in agreement with the price. Everybody was satisfied that was the fair price; so the sale was made at that price, and on December 29th, each one of the nine executives gave his check to Mr. du Pont for the price of 1000 shares at \$320, amounting to \$320,000, which money Mr. du Pont put in the bank.

Then, as I have said, in subsequent years he had to keep paying the equivalent of the dividends; and as the stock mushroomed up, he had to agree to return more stock.

The issues of fact here are very few. It is just a matter of showing some matters that we were not able to stipulate, such as the belief on the part of the parties that the \$320 was a reasonable price, and a few matters of that kind,

and to bring out the history that I have been reciting, except as it appears in the documents.

The documents do not quite tie the whole story together, so that we have to have some little testimony to piece it up; but it will leave us with just the question of law, I believe, as to this—was this deductible, or was it not?

THE COURT: That of course includes the question of whether or not the income tax was also deductible which the Delaware Realty Company had to pay, does it not?

MR. IVINS: Yes, it would include that too; and of course I won't go into the documents at this time on that hook-up, because they are voluminous and involve several different lines.

THE COURT: Mr. Lewis, I should be interested instead of following the usual course of procedure in letting the plaintiff put on his witnesses, I should like to hear the Collector of Internal Revenue in respect to the legal proposition. I think it would facilitate the taking of the testimony.

OPENING STATEMENT FOR DEFENDANT.

MR. T. J. LEWIS, JR.: If your Honor please, I think that it would be fair to the Court, as well as to Mr. Ivins, to say that the Government appreciates the fairness of his statement. I have not much to add to that, except to refer to this fact which Mr. Ivins inadvertently omitted to mention: Shortly after the transaction in which Mr. du Pont sold to each of those nine executive committeemen 1000 shares of stock, the price of du Pont stock materially decreased; so that instead of conferring a favor upon the committeemen by this transaction, it began to look like they had bought a "pig in a poke," and were going to be very much hurt by it.

Accordingly, the President of the company, Mr. Irene du Pont, wrote to Mr. Pierre du Pont, stating this condition and the concern it was causing both the committeemen on the one hand, and the company on the other.

Whereupon, Mr. Pierre du Pont transferred certain shares of the Christiana Securities Company to each of those executive committeemen for the purpose of making up the apparent loss which they were sustaining on the original transaction. In other words, they bought this stock for \$320,000, for which they had to pay. About two years or a year and a half, it developed that the du Pont stock had so decreased on the market that it was worth maybe \$150,000; so that apparently the committeemen had \$170,000 to pay for which they had nothing.

To take care of that situation, Mr. Pierre du Pont transferred, as I say, those additional shares of Christiana stock, and in making that transfer, he stated in writing the purpose of that transfer, and of the whole transaction.

That was contained in a letter which he addressed, the identical letter which he addressed to each of those committeemen, and which is contained in the stipulation.

I will briefly refer to that Exhibit R. It is a letter dated April 1, 1921, which is addressed, this is particularly, to Mr. W. S. Carpenter, who was one of the nine committeemen.

THE COURT: I have it here.

MR. LEWIS, JR.: The stipulation shows that an identical letter was addressed to each of the other eight members. Mr. du Pont says, referring to the original transaction:

"The object of the transaction was (1) to recognize the good work done by you for the company;

(2) To encourage you in further effort to benefit yourself and other stockholders, by placing you in a position to share in the profits of the company;

(3) To continue the plan of ensuring good management of the company's affairs by enlisting permanently the services of able men through securing for them a personal interest in the company's success, apart from salary compensations."

Now, at the present time, I think it not necessary to read the rest of the letter because I can state briefly that the purport of it is that because those purposes did not seem likely to be accomplished, some adjustments in the original plan would have to be made; and for that purpose, Mr. du Pont was willing to transfer those additional stocks, retaining a right or option to repurchase at any time for \$160,000.

THE COURT: I am not quite clear. Mr. du Pont gave over this additional stock at a stated price?

MR. LEWIS, JR.: He gave it to them with a right in Mr. du Pont, to repurchase, if he so elected. If he did not exercise the option, the stock belonged to them. In the meantime, they were to receive a certain part of the dividends on the second lot of stock he had given to them.

THE COURT: And it was put with collateral on their loan?

MR. LEWIS, JR.: That is right. The importance of that, from the Government point of view, is this: Your Honor has not, I suppose, had occasion specifically to refer to the statute under which this question arises?

THE COURT: No, I have not.

MR. LEWIS, JR.: I think perhaps your Honor will be interested then in seeing what the law says about it. The statute permits certain deductions from gross income. The plaintiff has not very definitely stated under what section of the statute this particular deduction is claimed. There must be some such section, because the law, as established by the Supreme Court is this, that while in determining whether or not an item is to be included in income, a liberal rule in favor of the taxpayer prevails. On the contrary, when the taxpayer is claiming a deduction, he must point to the express statutory right to make the particular deduction which he is claiming.

Now, in view of the fact in this case, your Honor, no reference has been made to any express specific provision

for this particular deduction, and I am somewhat at a loss to refer your Honor to the statute; but so far as I know, there are but three sections under which, by any construction, this particular deduction might be claimed.

The first is found under Section 23-A of the Revenue Act of 1928. That section permits the deduction of expenses, and it provides:

"That all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, travelling expenses, including the entire amount expended for meals and lodging while away from home in the pursuit of the trade or business, and rentals or other payments required to be made as a condition to the continued use or possession for the purposes of trade or business of the property to which the tax payer has not taken or is not taking title, or in which he has no equity"

The next provision under which this deduction might possibly be claimed, is Section 23-B, which refers to interest, and provides that a taxpayer may deduct all interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities other than obligations of the United States, issued after September 24, 1917, and originally issued and subscribed for by the taxpayer, the interest upon which is wholly exempt from taxation under this title.

THE COURT: Will you read that again?

MR. LEWIS, JR.: I will read the material part. The latter part is an exception of certain interest in which we are not interested in here, so that the material part is this:

"The tax payer may deduct all interest paid or accrued within the taxable year on indebtedness"

That is the material provision. The next provision under which the deduction might be possibly claimed, is the provision relating to losses.

In view of the fact that Mr. Ivins in his statement did not contend that this was a loss, it is hardly worth while referring to these sections, because obviously this is not a loss so far. It may turn out as a gain. He may make money when this transfer is over. The transfer is not yet completed; and accordingly, no loss can be taken, because the statute requires that the loss must be sustained. That can not be so. I will read it, your Honor. It is very short:

“In the case of individual losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business, or if incurred in any transaction entered into for profit, though not connected with the trade or business, or property not connected with trade or business, if the loss arises from fires, storms, shipwreck or other casualty, or from . . .”

That makes the thing complete, but it may be too complete.

Now, it is because of the fact that practically there are only two sections under which such deductions as are here claimed might be taken, that the Terbell case, the Second Circuit case to which Mr. Ivins referred, and the Dart case, the Fourth Circuit case, to which he refers, differ.

In the Terbell case, the man who made the supposed short sale was not engaged in any business. This was an isolated transaction. Consequently, to claim the loss at all, he must claim it as interest. I say the loss—I was thinking of something else—to claim the deduction at all, he must claim it as an interest deduction, because interest is deductible regardless of whether it is incurred in trade or business, or in connection with trade or business, or personal matters; but interest is deductible.

However, expense is not deductible under those circumstances. It must be an expense which is directly connected

with, or approximately results from, the conduct of a business.

So that the Dart case turned on the question of whether or not the taxpayer there was engaged in a trade or business, and whether those payments which he made were made in connection with his trade or business; and the Fourth Circuit, disagreeing with the Board, I think, chiefly, on that fact question, allowed the deduction.

Now, we have here, really in the last analysis, that question only: Was this expense which is here claimed as a deduction, an expense which Mr. du Pont incurred directly as a result of his business? Of course, the Government contends it was not.

Now, Mr. Ivins says, or I understood him to say, that Mr. du Pont's business was the business of managing his investments; that he was a man of large affairs; that is undoubtedly true.

Now, if I had been presenting the case for the taxpayer, I should have mentioned to your Honor a ruling which your Circuit Court made some time ago in the Peoples Pittsburgh Trust Company case. In that case your Circuit held that an officer of a corporation was engaged in business when he performed his official duties; that the duties of the officer were his business; and that accordingly, in that case—I can not recall the man's name now, but he was the executive officer of the Crucible Steel Company—and in the course of his duties as such, it became necessary for him to sign and swear to an income tax return, which he did.

The Government for some reason or other thought the return was false, and they indicted him. Now, was that man's name Pugh? I will call him that any way. They indicted Mr. Pugh and he was tried and acquitted.

Now, in the course of that trial, he paid out large sums to the attorneys who defended him; and the question was whether or not those payments could be deducted as a business expense; and your Circuit Court held that they could be, and that they were directly a part of the taxpayer's business; that in the course of his duties as such, it became

necessary for him to file and sign this return; and the payment of the expenses approximately resulted from that act, because an illegal color was, by some one else, ascribed to the thing he did; and it was the outcome of his employment; accordingly, they allowed the deduction.

That was an interesting case and there is another one in the First Circuit, which is similar to that.

Now, after this Third Circuit case was decided, a similar question went to the Supreme Court; and the United States Supreme Court in three cases, at least, held that there was a distinction between the taxpayer's business and the business of the company for whom he was acting; and that a loss which the taxpayer sustained in connection with the promotion of the company's business, was not a loss incurred in the taxpayer's trade or business.

THE COURT: Pardon me, will you state that again? The taxpayer in the particular case that you referred to, the Crucible Steel case, made this return as executive treasurer, or something of that sort, of the Steel Company, did he not?

MR. LEWIS, JR.: That is right.

THE COURT: And thereafter the return was impeached by the United States Government, and a criminal proceeding took place, in which the treasurer was indicted?

MR. LEWIS, JR.: Yes.

THE COURT: And the Third Circuit ruled that he was entitled to deduct that as a business expense?

MR. LEWIS: That is right.

THE COURT: And the Supreme Court reversed it?

MR. LEWIS: No, sir. That case never went any higher; but in other cases, the Supreme Court did make the distinction between an expense which directly and approximately resulted from the taxpayer's business and from the business of the corporation.

I think I can not explain that; but your Honor will undoubtedly read those cases. The reason I am referring to

this is to try to indicate to your Honor the important parts which this evidence will have when it comes before you. I am trying to point out the distinction between an expense connected with the corporation's business and an expense connected with the taxpayer's business.

THE COURT: I see your point.

MR. LEWIS, JR.: In this case it is our position that the expense undertaken by Mr. du Pont, the transaction into which he entered, was not a part of his duties as chairman of the board of directors of the du Pont Company. It was something entirely extraneous to those duties. It was undertaken for the purpose of benefiting the company's business; and thus indirectly resulting in a profit, or a benefit to Mr. du Pont as a shareholder, and to other shareholders of the du Pont Company. Also we contend that the cost, the proximate cost of these expenditures, was the advancement of the company's business, and that accordingly, it can not be said that this was an expense of Mr. du Pont's business.

Assuming that the Third Circuit is correct in saying that his business is the conduct of the affairs within his employment; assuming that to be true, still in this case, the expense did not approximately result from that employment, as it did in the Pittsburgh Peoples Trust Company case. This was something Mr. du Pont undertook entirely outside his employment, and for the purpose of benefiting immediately the company and its business, to the end that the stockholders might receive greater dividends.

— Right or wrong, that is the Government position on that point.

The other point is the question of interest.

On the question of interest, I take it, it is right well settled that interest is the compensation paid for the loan of money, and is not compensation for the loan of a horse or bonds or stock.

Interest is commonly understood as the amount you pay for the use of money; and that is not this case.

There is only one other thing I want to say, unless your Honor has some further questions, and that is this: That under any ideas of business, there is involved the concept of profit; any transaction in which a taxpayer enters as part of his business, must look ultimately to profit in that transaction.

THE COURT: Recess for five minutes.

(After a short recess.)

MR. LEWIS, JR.: I was about to mention the fact that this transaction was not entered into by Mr. du Pont for the purpose of making profit directly. The transaction was not supposed to get profit indirectly; it was supposed to increase the value of Mr. du Pont's stock.

In that view, it would be a capital expenditure, deductible as Mr. Ivins has explained, when the transaction is closed, provided that the statute permits such a deduction, on the idea that profit is so inextricably mixed up with the idea of business that unless this was entered into for profit, it could not be expense incurred in the business.

I do not know whether it is exactly fair or not to refer to the past practice of the Bureau in a case of this kind; it certainly is immaterial in this case what the Bureau did in 1921 under an entirely different statute, and what it did in 1924 under another statute, and what it did in 1926 under another statute is certainly not material to what is the proper thing to do in 1931 under another statute.

I am not referring to these different statutes; but the fact is they all use the same language, so that, presumably, the interpretation of one would be a correct interpretation of the other.

However that may be, the fact is that these rulings to which Mr. Ivins refers were all made prior to the interpretation placed upon this term of "trader" by the Supreme Court.

The question which your Honor has to decide here is not whether the Bureau was wrong or right in 1921 or 1922, or any other year, except 1931.

The question is: What should be done with these deductions properly in 1931? That question must stand on its own bottom. It must stand upon the proper interpretation of the 1928 Act. It must stand on the facts as there made to appear in this case, and not on facts which may or may not have been disclosed to the Commissioner, when he ruled in other years.

I think the matter is entirely irrelevant; and for that reason, although I have agreed to the stipulation which refers to some taxes paid in 1933, I have agreed to that stipulation with the reservation of my right to object as to the materiality.

I understand the practice of this Court is not to offer the stipulation but file it as a record. That being true, I want to enter now my objection to that portion of the stipulation which refers to taxes paid in 1933, with reference to the income for the year 1932.

THE COURT: I am not quite clear. Will you point out the portion of the stipulation to which you refer?

MR. LEWIS, JR.: Yes, sir. It is paragraph 17, and it is the last two sentences in that paragraph. The first of these two sentences beginning, "In 1933 the Commissioner of Internal Revenue determined that \$80,000 paid by the plaintiff to the Delaware Realty Company was income to that company." And the last sentence:

"It was income to the said company in that year, and that an additional tax was due thereon, and plaintiff was called upon to, and did, in 1933, reimburse the said company on account of said additional tax in the amount of \$9607.98, together with interest thereon of \$63.98, a total of \$10,271.00."

I am inclined to think that the reference to the year 1931 is a typographical error. The reference should be to 1932.

THE COURT: Mr. Ivins, is that an error?

MR. IVINS: My understanding is that the payment was made in 1931.

MR. LEWIS, JR.: The tax, Mr. Ivins, for 1931, could not be determined until after 1931.

MR. IVINS: It was on the 1930 tax income.

MR. LEWIS, JR.: We will straighten that out.

THE COURT: I understand your point is you deem the statements in these last two sentences of paragraph 17 to be immaterial?

MR. LEWIS, JR.: Because it refers to other years other than 1931.

THE COURT: And as I understand it, Mr. Ivins' objection is retained by counsel to anything in the stipulation which may prove to be immaterial?

MR. IVINS: Surely. I will ask Mr. Lewis if he has any other objections to materiality, because if he has not, we can sail along rapidly.

MR. LEWIS, JR.: I do not like to commit myself to that; but so far as I know, I have not. But I reserve my right to change my mind about that. I thank your Honor.

THE COURT: Now, shall we proceed with the testimony?

MR. IVINS: If your Honor please. In my opening remarks, I seemed to have confused some of my friends, and possibly your Honor got the same impression. I meant to say that these taxes imposed on the Delaware Realty Company were allowed as deductions to the plaintiff, originally by the revenue agent in this year.

THE COURT: I so understood.

MR. IVINS: I did not mean to intimate what had not had happened to this tax in prior years.

THE COURT: I understood that. I understood that was restricted to that one particular year.

MR. IVINS: As to the action of the Commissioner of Internal Revenue in the earlier years, it was not my pur-

pose to offer that to this Court as any binding agreement, or any *res adjudicata*, or even a *stare decisis*. That was merely that it is part of the picture of the interpretation of the law.

In the same way, the decision in the Dart case by the Board of Tax Appeals, is not binding on anybody, it has been reversed; but the logic in that opinion is something that the Court is quite at liberty to study; and the fact that an opinion has been signed by a man who is known as a sound jurist, might frequently have more weight than some language signed by another man.

In that way I think it quite fair to advise the Court that this question was not raised against the taxpayer until after the decision in the Dart case. That was the whole purpose of that.

Now, Mr. Irene du Pont.

IRENEE DU PONT.

IRENEE DU PONT, was called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

MR. IVINS: If the Court please, this is my first case in this jurisdiction. Except in one court in Massachusetts, where the witness had some handrails to hang on, it is the first one in which I have seen the witness stand. I had prepared my interrogatory to keep the chronological order straight, which would involve asking Mr. du Pont a few questions, and, maybe, referring to documents for quite a few minutes, and going back; and it seems it might be a burden on him to have to stand during the time I am doing that. Would it be permissible for him to be seated while not answering questions, your Honor?

THE COURT: Certainly. I think it permissible for him to remain seated while not answering questions. This is

Judge Nields' courtroom, and I follow his rule; and I see no reason why Mr. du Pont should not be seated while not answering questions. I suggest therefore a chair be placed for you.

MR. IVINS: Sit down a few minutes, Mr. du Pont. I want to begin by calling the attention of the Court in order to keep the chronological picture here straight, by referring to the fact that the stipulation shows first a formal matter, who the plaintiff is, his residence here, and that he filed an income tax return for 1931, which is annexed to the stipulation, Exhibit A, thereto. Second, that the defendant is the collector of the internal revenue; and third, the determination by the Commissioner of the deficiency in income tax for the year 1931, and the assessment and payment thereof. Fourth, the filing of the claim for refund, which is also Exhibit B annexed to the stipulation.

Those are formal matters, without which we could not be in court, but there is no dispute about that.

From there on, the language of the stipulation is principally for the purpose of identification of documents, and avoiding the necessity of bringing in witnesses to prove them; but to keep the continuity I would like to call the Court's attention from time to time to various of these documents, and maybe read a little from them as we go along.

By MR. IVINS:

Q. Now, Mr. du Pont, what is your full name and address?

A. Irene du Pont; I live at Granogue in Delaware, but my mailing address is Wilmington, Delaware.

Q. Were you at any time president of the E. I. du Pont de Nemours Company?

A. I was.

Q. Hereafter I will refer to them as the du Pont Company, your Honor.

THE COURT: Yes.

Q. When did you become president?

A. In 1919, April or May.

Q. And about how long were you president?

A. Seven years; I retired in March, 1926.

Q. Prior to becoming president, did you hold any offices with the du Pont Company, or the predecessor corporations merged into that?

A. I did.

Q. For how long?

A. From 1904 to 1919.

Q. Various offices, working up from the bottom?

A. Well, rather—

Q. From near the bottom?

A. Yes.

Q. Prior to 1919, what was the business of the du Pont Company?

A. I think up to 1914, you could say that it was essentially the business of manufacturing explosives, both military and commercial, but largely commercial. In the beginning of the war, in 1914, the military business became very much accentuated, so that it was nearly the entire business; but during that same period, the du Pont Company branched out with the view of having other strings to their bow. They went into the pyroline business, and undertook to go into the dye and paint business and artificial leather business; so that from the period of 1914 to 1919, they were trifling in comparison with the smokeless powder business, and we were getting experience in making an organization. After 1919, the large smokeless powder business died at the end of the war, and we were put to it to broaden the scope of the company's work, and enlarge the new industries we had gone into, as rapidly as we could.

Q. Were you director of the company and chairman of its finance committee in 1919?

A. I was chairman of the executive committee from 1915 to 1919. When I became president, I retired as member of the executive committee. I was vice-president from 1914 to 1919.

Q. On the finance committee?

A. I went on the finance committee, I think in 1915, but I was not chairman. Pierre was chairman in 1915 to 1919, I think.

Q. You still, as president, were ex officio member of that committee from 1919?

A. Not the executive committee.

Q. Not the executive committee, but finance?

A. I am not sure I was. I have forgotten. I think in 1919 that Pierre was chairman of the finance committee, and I was a member of it. He was chairman of the board of directors after he retired as president. That was seventeen years ago.

Q. But you were probably a member?

A. I was a member, sir.

Q. In Section 10 of the stipulation, reference is made to the following men:

Lammot du Pont.

F. Donaldson Brown.

Walter S. Carpenter, Jr.

A. Felix du Pont.

J. B. D. Edge.

C. A. Meade.

Charles A. Patterson.

W. F. Picard.

W. C. Spruance.

Q. Who were those men, or what was their relation to the du Pont Company?

A. Members of the executive committee at the beginning, until April, 1919, or in the spring of 1919.

Q. Were they all the members of the committee?

A. They were all, nine.

Q. They were all members, but were they all the members; that is, were there any other members?

A. There were no others.

Q. What were their duties as members of the executive committee?

A. Lamot du Pont was chairman of the committee, and I think he had general supervising duties, general supervision. The other members had more or less specialties to look after. Mr. Edge supervised the purchasing on behalf of the company; he supervised the company's purchasing department. Mr. Picard supervised the general selling policy. Mr. Patterson was the head of the explosives division, both manufacture and sales, although Picard helped supervise the selling end. Felix du Pont had the nitrocellulose end of the business, which was with regard to the smokeless powder left over, and pyroline made of nitrocellulose. Donaldson Brown was the treasurer. Walter S. Carpenter, Jr., was in charge of the development department, looking up new opportunities of investment and expansion.

Did I cover them all? I am not quite clear.

THE COURT: You omitted Mr. Spruance.

THE WITNESS: He had returned, he had been with the Government, and was put in charge of general manufacturing of all the divisions, a sort of liaison officer.

THE COURT: And Mr. Patterson?

THE WITNESS: Patterson was head of the explosives division.

Q. That is what they were doing respectively in their own offices. Now, as to the executive committee?

A. They met weekly and as a group acted as a composite general manager of the company's affairs. The executive committee comes nearer to it than any other way I can explain it.

MR. IVINS: I offer as Plaintiff's Exhibit 1, and I understand there will be no objection, a certified copy of a memorandum or letter from the files of the finance committee.

THE COURT: Have you any objection, Mr. Lewis?

MR. LEWIS, JR.: Are they the papers you showed me?

MR. IVINS: Yes.

MR. LEWIS, JR.: I have no objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 1.")

MR. IVINS: This is addressed to the finance committee by Pierre S. du Pont, saying:

"I recommend that a committee be appointed to study the question of proper compensation to the members of the new executive committee with the request that this committee investigate methods adopted by other corporations toward the securing and retaining of men in similar valuable positions. The salaries now being paid by the du Pont Company do not seem sufficient to ensure best results for any length of time."

That was signed by the plaintiff.

By MR. IVINS:

Q. Now, Mr. du Pont, can you tell me, if you recall, the circumstances surrounding that letter, at the time of the receipt of that letter?

A. At the time, Pierre retired as president, and we put a new executive committee in, the old executive committee that I had been chairman of, had largely retired, on the theory that sort of due to the spirit of touch-and-go during the War, when decisions had to be made in five minutes without adequate study—we thought it would be a good plan to put in a new group of men who would study things very closely, so that we made a general switch at that time. I think I was the instigator of that idea, and I retired for that cause.

Now, these men were not being compensated very highly with salaries; and we have always felt that it was of importance to compensate very highly, and especially by

some interest in the earnings of the corporation, the principal men. They will think harder and clearer if they have an actual financial interest in the concern. I am satisfied of that in my own mind, and have been for a good many years. Whether that was instigated by Pierre, by that letter, or that was the result of endless conversations we had, and we saw each other every day, I do not know, but we were both of the same mind.

Q. Had the du Pont Company at that time a plan in effect for bonus compensation for employees?

A. Yes, we had a number of years before that, and during the war, when the earnings were very high, and the fund available was liberal; but we were running into a period of unknown earnings, and we knew that the war earnings were dead, and we felt we might get into heavy losses, in the scrapping of the plant, and it would seem that the bonus plan might be utterly inadequate to get the best out of men who had to start from the ground and build up a new industry.

Q. I notice that this letter of June 23, 1919, Exhibit 1, does not refer to employees generally, but to the new members of the executive committee. Is there any special reason why they were entitled to special consideration?

A. I think the key men at the top should be rewarded adequately. That has been the history in other concerns. Andrew Carnegie took his partners in, and either they became millionaires, or they would be fired, but they mostly became millionaires. J. B. Duke told me that in the American Tobacco Company, he arranged that his principal men should receive 25 per cent. of the profits; and when the American Tobacco Company was dissolved, he had sixty-six million dollars divided among the sixty, and it made the American Tobacco Company go pretty well.

MR. IVINS: I would like to offer as Plaintiff's Exhibit 2 to 9, certified copies of minutes from the executive committee's books. These minutes show on June 25th. a resolution was adopted that the chairman ap-

point a committee of one to study the proper method of compensating the members of the executive committee. Mr. Brown was appointed that one.

On July 30, Mr. Brown reported progress and asked for more time. On August 13th he brought in an interim report and asked for more time.

These interim reports do not concern us because they were mostly reports of what had been done by other companies.

On August 27th, a resolution was adopted appointing a sub-committee of three, of which Mr. Brown was chairman, Irene du Pont and Mr. Raskob, the other two members.

On September 10th, Mr. Brown reported progress.

September 24th, Mr. Brown reported progress and got more time. On October 8th, he brought in another interim report which was laid on the table, pending a complete study. On October 29th, he stated that a report would probably be submitted in time for consideration at the next regular meeting. They were getting close to something definite.

THE WITNESS: May I interrupt? I think Mr. Ivins referred to these as minutes of the Executive Committee, but they are of the Finance Committee.

MR. IVINS: You are right. That should be the finance committee.

THE COURT: Admitted as one exhibit.

MR. IVINS: I have my numbers of exhibits to run through in my preparation, and if I can retain those numbers, it will be handier.

THE COURT: Very well.

(Received in evidence and marked "Plaintiff's Exhibits No. 2 to 9" inclusive.)

MR. IVINS: I offer in evidence Plaintiff's Exhibit No. 16, a report dated November 11th, to the finance committee from the sub-committee.

MR. MORRIS: No objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 10.")

MR. IVINS: This plan suggested by the sub-committee to the finance committee contemplated an annual contract. I suppose by that they meant a contract from year to year that could be renewed with each member of the committee fixing his salary, and bonus, based on percentages of net earnings of the company, in excess of certain indicated return of capital, the bonus to be invested in stock of the du Pont Company at current market prices, as that should fluctuate.

It provided that the company would issue 1000 shares of stock, Treasury stock, to each of those men at \$400 a share, to be held in trust for them, and the proposal for the terms of the trust was indicated here. It is not particularly important, because it was not finally carried through; but it shows the reasons and the purpose behind the transaction that followed.

Now, your Honor, I seem to have missed Exhibit No. 11. Now, as Exhibits Nos. 12 and 13, we have some more minutes of the finance committee. We offer as Exhibit 12, minutes of the meeting of November 12, 1919, in which reference is made to the meeting of August 27th; and after full discussion it was moved and carried that the report be referred back to the sub-committee, with the suggestion that consideration be given to the making of a provision for securing the common stock, in event of the death of the beneficiary; in other words, this sub-committee report of November 11th, was sent back for further consideration; and on November 26th, the sub-committee was granted further time. Those are Exhibits 12 and 13.

(Received in evidence and marked "Plaintiff's Exhibits 12 and 13.")

MR. IVINS: Now, this, Mr. Lewis, I do not believe you have seen yet (handing).

MR. LEWIS: In fact I gave it to you. No objection.

MR. IVINS: This we offer as Plaintiff's Exhibit No. 14, your Honor, a letter from the vice-president of the du Pont Company to Mr. Richard V. Lindabury, who was a very prominent corporation lawyer in Newark, at that time, transmitting some proposed contracts, which we do not have but which presumably are along the lines indicated in that report of November 11th, and asked for his opinion thereon.

(Received in evidence and marked "Plaintiff's Exhibit No. 14.")

MR. IVINS: As Plaintiff's Exhibit 15, we offer the reply which was received from Mr. Lindabury, saying that he did not think the plan was sound, because the issuance of stock was in violation of the statutes.

MR. LEWIS: I have no objection to that, if it is merely to show that part of the plan.

MR. IVINS: It is not for the purpose of showing what the law was, but merely for the purpose of showing that the original plan of the Executive Committee was abandoned by reason of Mr. Lindabury's advice, and something else had to be done.

MR. LEWIS: I have no objection to it for that purpose.

THE COURT: Admitted.

(Received in evidence and marked "Plaintiff's Exhibit No. 15.")

MR. IVINS: As Exhibit 16 we offer another minute of the finance committee of December 10, in which Mr. Brown reported progress, and asked for more time. He was almost like a lawyer!

MR. LEWIS: No objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 16.")

MR. IVINS: I call the attention of the Court to paragraph 13 of the stipulation, which shows that the Christiana Securities Corporation was the owner of 183,000 shares of the common stock of the du Pont Company, out of the total of 588,542 outstanding. That latter figure appears in paragraph 12 of the stipulation. Paragraph 13 also shows that the plaintiff owned 29,125 shares of the Christiana stock.

I also call the attention of the Court to the Exhibit E annexed to the stipulation. I understand the defense has no objection.

That is a report made by the treasurer of the Christiana Securities Company to the board of directors there, in which he says:

"The Finance Committee of the E. I. du Pont de Nemours & Company has tentatively approved a plan for interesting the members of its executive committee as substantial partners in the corporation which plan requires nine thousand (9000) shares of common stock. It is not possible to purchase this stock in the market except at what would perhaps be considered exorbitant prices and there is grave doubt as to the legality of issuing nine thousand (9000) shares from the company's unissued stock for this purpose.

"Mr. Pierre S. du Pont is willing to sell nine thousand (9000) shares of common stock of E. I. du Pont de Nemours & Company for the purposes of the plan. As he has no stock it will be necessary for him to sell short, which in turn makes it necessary for him to borrow said stock.

"As the Christiana Securities Company is so deeply interested in any plan that has to do with the success of E. I. du Pont de Nemours & Company in which it is the principal stockholder, I recommend that this Board authorize the officers to endorse and deliver up to nine thousand (9000) shares of common stock of E. I. du Pont de Nemours & Company to Mr. Pierre S.

du Pont as a loan, taking as security from him, 3800 shares of stock of the Christiana Securities Company duly endorsed in blank under such form of agreement as may be approved by our attorney, outlining the facts that said 3800 shares of Christiana Securities Company are held as collateral to a promise of the said Mr. Pierre S. du Pont to return said nine thousand (9000) shares of common stock of E. I. du Pont de Nemours & Company to our Treasury within ten years;"

That indicates that the time limit of this is to be ten years, and that the dividends on the collateral of 3800 shares would go to Mr. du Pont, and that dividends on the nine thousand shares would be remitted by Mr. du Pont, to the Christiana Securities Company.

By MR. IVINS:

Q. Mr. du Pont, can you corroborate the statements made by the treasurer of the Christiana Securities Company to its board of directors, with respect to these facts that he recited; were those facts as I read them, correct?

A. Your reading was substantially correct as to what happened.

Q. Did the du Pont Company have available for sale to members of the executive committee 9000 shares of common stock other than unissued stock?

A. In 1919, I think not. It had only a few shares, but it had no 9000.

Q. Why did not the du Pont Company purchase the necessary shares in the market?

A. The market was very lean, and it would not take very much to put the price up, and you did not know whether you would get it anyhow; and it is hard to conceive of, because with the stock listed with enormous sales, it seems inconceivable there was difficulty in buying du Pont, but if it was a private transaction, you could get small amounts from Laird & Company, but there was no large trading at all.

Q. When was the du Pont Company stock listed on the New York Stock Exchange?

A. I think the 22d of April or May 22d, 1921.

Q. Before that time was there any brokerage house that was recognized as making a specialty of trading in du Pont stock?

A. Laird & Company, which I have just mentioned, was the recognized house to buy that stock through. The other brokerage houses did some buying and selling, but they acted mostly as brokers, whereas Laird & Company were brokers and dealers and they kept stock of their own.

MR. IVINS: If the Court please, we have in Court, from the records of the du Pont Company, the book which contains the list of all the du Pont Company stockholders and their holdings at the end of December 1919. We also have the custodian of that book, who is prepared to testify that therefrom he has compiled a list of all the stockholders holding 1000 shares or more.

It may be that Mr. Lewis will be willing to stipulate that we can use that list without producing the book or witness, or perhaps he would rather have the witness on the stand.

MR. LEWIS: I have never heard of it before. I have no doubt I shall agree after I have seen it, but I can not do it in the dark. Let it pass. I have no doubt we can. May I reserve my objection, your Honor?

THE COURT: Certainly. I do not see the purpose either.

MR. IVINS: If the Court please, I want to give this to Mr. du Pont, to refresh his recollection, in asking him if there were any other stockholders outside Mr. Pierre du Pont, who would have sold 9000 shares, and if so, why they did not go to them.

THE COURT: I see the significance of it now.

MR. IVINS: We offer in evidence as Plaintiff's Exhibit 16½, a list of stockholders of the du Pont Com-

pany holding 1000 shares or more of common stock on December 31, 1919. This offer is made subject to the reserved right on the part of Mr. Lewis to move to strike it out if we can not satisfy him, or prove to the Court, its accuracy.

THE COURT: Let it be admitted on the terms stated, reserving to Mr. Lewis the right to strike it out if the figures are not in accordance with the terms stated.

(Received as "Plaintiff's Exhibit 16½.")

By MR. IVINS:

Q. Mr. du Pont, I ask you to refresh your memory from this list, and tell us if there were any other stockholders who might have sold 9000 shares of stock?

MR. LEWIS: Just a minute. I understand that that is a summary taken from the stock books of the company; is that right?

MR. IVINS: That is right.

MR. LEWIS, JR.: What possible good then can Mr. du Pont's memory serve as against the records?

MR. IVINS: I should change that question, your Honor. Mr. Lewis is quite right in his objection to the form of the question. I frame the question this way—

Q. Mr. du Pont, we show you a list from the records of the company of stockholders having 1000 shares or more, on which you will probably find some who have more than 9000 shares. I will ask you to tell us if there were any reasons why those indicated there, who had more than 9000 shares, were not approached, rather than Mr. Pierre S. du Pont, for the purpose of finding shares to sell to the executives?

MR. LEWIS, JR.: I object to that. It is perfectly immaterial in this case.

THE COURT: I have some difficulty in seeing the pertinency of that, in so far as it relates to what Mr.

du Pont may be able to testify in respect to it. You have offered a list from which he can refresh his recollection and state from the list the number of the number of large stockholders who might be able to make some loan of stock for the purpose that Mr. Pierre du Pont wanted; but can Mr. du Pont testify completely as to all the circumstances which might have governed the various persons on this list? In other words, is this the best evidence?

MR. MORRIS: And furthermore, I think the point is that Mr. du Pont himself was the one who had done this, and whether somebody else could have done it or not, seems to us entirely immaterial. He has done it, and the legal effect of his having done it is the question for your Honor, and the sole question.

MR. IVINS: I will withdraw the question, your Honor. There won't be any more questions for several minutes, Mr. du Pont:

If the Court please, I wish to call attention at this point to the facts as stipulated, that Mr. du Pont held 29,125 shares out of a total of 75,000 shares of Christiana stock.

Now, Christiana held 183,000 shares of du Pont common. If we take the ratio of 29,125 over 75,000 shares and multiply it by 183,000 shares, it gives a total of 71,065 shares of du Pont, of which the plaintiff was indirectly the owner, through his ownership of Christiana stock.

It also appears from the stipulation, that Mr. du Pont had given 10,000 shares to a trustee for the Chester County Hospital. The trust instrument is annexed to the stipulation, and from that it would appear, after certain payments had been made to the trustee, that the corpus of the stock was to be returned to Mr. du Pont.

Similarly the stipulation shows the deed of trust to the Delaware School Auxiliary Association, the trustees for that organization, and there were 14,000 shares

which in time would come back to him, after the purpose of the trust was satisfied.

So, adding 71,065 shares to 10,000 and 14,000 and 74 shares that stood in his name on the books, it shows us a total of indirect ownership there, or interest in Mr. du Pont of 95,139 shares, which is more than 16 per cent. of the outstanding 588,542 shares of the du Pont Company. So that he was the owner or the indirect owner, and equitably and financially interested in one-sixth of the du Pont Company's stock.

Annexed to the stipulation is Exhibit C, which are the minutes of the special meeting of the board of directors of the Christiana Securities Company, on December 12, 1919, and there, after the formalities a report was received from the treasurer, dated December 11, 1919, advising that the finance committee of the du Pont Company had tentatively approved the plan for interesting the members of the executive committee as substantial partners in the corporation, which plan requires 9000 shares of common stock. It states:

"it is not possible to purchase said stock in the market except at what would perhaps be considered exorbitant prices and that there is grave doubt as to the legality of issuing 9000 shares from the company's unissued stock for this purpose; that Mr. Pierre S. du Pont is willing to sell 9000 shares of the common stock of du Pont Company for the purposes of the plan, and that inasmuch as this company is the principal stockholder in E. I. du Pont de Nemours & Company, and is deeply interested in its success, he recommended that the proper officers be authorized to endorse and deliver up to 9000 shares of common stock of E. I. du Pont de Nemours & Company to Mr. P. S. du Pont, as a loan taken as security from him 3800 shares of stock of the Christiana Securities Company."

It recites pretty much the same thing as in the report itself, which is also in evidence.

The resolution shows that it was moved and carried that the report be accepted and approved, and resolved that the officers, Mr. Irene du Pont, Vice President, and Mr. Raskob, President, were authorized to endorse and to deliver to Mr. du Pont or his nominees, 9000 shares.

That shows how Mr. du Pont got the 9000 shares that were actually delivered.

Now, this is another one you will look at, Mr. Lewis (handing). I offer as Plaintiff's Exhibit No. 17, certified copy of extract from minutes of the finance committee meeting of the du Pont Company of December 15, 1919, in which it shows that the sub-committee reported that various modifications of the proposed contract had been under consideration, but the completed draft was not yet ready, and it asked for time to submit the thing to the legal department. It is just another step in the chain of the picture.

MR. LEWIS, JR.: No objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 17.")

MR. IVINS: We offer as Plaintiff's Exhibit No. 18, the complete minutes of the finance committee meeting of December 16, 1919. A resolution was adopted authorizing the president to say to the members of the finance committee that the finance committee have under consideration the working out of an arrangement with each member of the executive committee, under which, in lieu of their participation in the bonus plan of the company, they will have a definite contract under which they will receive (a) \$30,000 per year salary; (b) \$150,000 at the end of five years if they are still in the employ of the company as members of the executive committee or occupy some other position approved by the finance committee as equivalent thereto; (c) One per cent. (1%) of the annual net earnings of the company received from the capital employed under their direc-

tion after deducting 10 per cent. on the amount of said capital as shown on the books of the company; such additional compensation to be payable in common stock of the corporation at cost if same can be secured at prices which in the opinion of the finance committee seem reasonable, otherwise payable in cash."

"The company will also pay the premiums on a \$150,000 life insurance policy on the life of each member of the executive committee for five years."

There was a further resolution that the contracts be submitted to the stockholders for approval, if the directors determine that that is necessary or advisable. Whether that was done, I do not know.

THE COURT: Any objection, Mr. Lewis?

MR. LEWIS, JR.: No objection.

THE COURT: Admitted without objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 18.")

MR. IVINS: This particular document does not relate to the purchase of the stock, but was a step necessary to put the members of the finance committee in funds to make the stock purchase.

We call the attention of the Court to Exhibit L, which is annexed to the stipulation. That is a letter from Mr. Irene du Pont to the nine members of the executive committee, dated December 20th, 1919. He says:

"Attached is a computation used by P. S. du Pont in arriving at a price for du Pont's common stock for the purpose that I spoke to you about on Thursday last.

"In Pierre's absence, I think it would be well for you to look over this computation and give him the benefit of any criticism which you may have, either concerning the principle of valuing of this stock, as indicated, or in the detail computation of the amount."

Annexed to it are several pages of figures and computations showing that the treasurer of the company worked out a figure of \$320.94 per share as the net asset value of the du Pont common stock.

MR. LEWIS, JR.: Don't you think the record ought to show that these circles, wherever they appear, indicate red figures?

MR. IVINS: In making photostats it is impossible to print in red, so that we have shown circles around where it should be red ink. There are several exhibits where that red circle has been put around.

The figure arrived at by the Treasurer there was \$320.94. The price at which Mr. du Pont actually sold these 9000 shares is shown elsewhere in the stipulation to have been \$320 even per share.

(Here Mr. Irene du Pont resumed the stand.)

By MR. IVINS:

Q. Mr. du Pont, in this letter I have just read, Exhibit L, you said to these members of the executive committee:

"Attached is a computation used by P. S. du Pont in arriving at a price for du Pont common stock for the purpose that I spoke to you about on Thursday last."

Can you identify the purpose that is mentioned in that letter?

A. I took it for granted that in line with my instructions to take it up with the executive committee, and tell them what we proposed to do, I certainly did discuss it with the members of the executive committee at the time.

Q. Now, was this memorandum or letter, and the annexed computations, delivered to the nine members?

A. I presume it was.

Q. Did you consider the price of \$320 a share for the nine thousand shares sold, other than as a fair and reasonable price?

MR. LEWIS, JR.: I object to that.

THE COURT: On what ground, Mr. Lewis?

MR. LEWIS, JR.: On the ground that it is stipulated that this is a closed transaction, that is the price which was used, and that is the way they arrived at it, and it will make no possible difference what this witness thinks was a fair price or ought to be.

THE COURT: Is there any question as to whether or not this was or could possibly be construed as a gift?

MR. LEWIS, JR.: I do not know how you could construe it so; but even so, it would not depend on whether the price of \$320 was reasonable or not, because this record shows, so far as this transaction was concerned, that was the price used, and that is how it was arrived at.

THE COURT: I am inclined to think the question is admissible. I overrule the objection.

MR. LEWIS, JR.: Exception.

THE COURT: Note an exception, please.

A. At the time, it seemed to me to be a reasonable price. I did not put the stock in at ninety cents, because you can not measure prices within 10 per cent. of the closure.

MR. IVINS: I do not have any more questions for several minutes, Mr. du Pont.

THE COURT: Just a moment. This Exhibit L, let me make sure. I understand some of the language on this last page, the reduction, for example, for special depreciation and bad debts, are actually carried into the column on the first page of the exhibit, are they not? In other words, if there had been a previous statement, bad debts, for example, would have been carried at \$1,222,000 (reading) "But since \$500,000 of that is the best estimate procurable at this time, it indicates . . ."

MR. IVINS: Yes. As I understand that, your Honor, the company's books showed reserve for bad debts of \$1,222,000 odd, which really was not regarded as an asset, because they expected the debts to go bad, but at this time they made the estimate and found that probably \$500,000 would be amply sufficient to cover the bad debts; so they are really restoring \$700,000 to available capital.

THE COURT: I see.

MR. IVINS: Now, Exhibit J annexed to the stipulation is a letter from Mr. Irene du Pont to the finance committee, in which he indicates that he has interviewed the individual members of the executive committee in accordance with their action of December 16th, and points out that Mr. P. S. du Pont has made an offer of 1000 shares of common stock to each of the executive committee members. Mr. Irene du Pont recommends to the finance committee that the treasurer be empowered to loan such finance committee \$320,000 for five years, taking as collateral 1000 shares of du Pont common stock, and a life insurance policy for \$150,000 each.

This action, when taken, completed the picture on the executive committee side. They had a new contract for salaries and bonuses.

Now, they were allowed to borrow \$320,000 from the corporation, with which to buy the stock from Mr. du Pont; and they would put that stock in as collateral to the loan, and I suppose they expected out of their earnings and the bonus they would get at the end of the five years, to pay off that loan of \$320,000 apiece.

We do not have the executed contracts between the du Pont Company and the executives that closed this transaction; but the form of those contracts is shown in the minutes of the finance committee, or an extract from the finance committee's records annexed to the stipulation, as Exhibit K.

The Court will note that the stipulation in paragraph 10 states that these contracts were executed between the du Pont Company and the nine members in that form. I do not think it necessary for the Court at this time to burden itself with details of the resolutions and contracts. The general effect of them are as stated several times.

The executives were borrowing \$320,000, and using it to buy stock from Mr. du Pont, repaying the loan over five years.

So we think on the one hand the Christiana Securities Company lending the du Pont stock to Mr. du Pont, and the executives borrowing \$320,000 from their company, and Exhibit D attached to the stipulation is the formal agreement between the plaintiff and the Christiana Company, under which he got the loan of the stock, and promised to make good at the rate the dividends were paid, is sufficient.

Chronologically, the next step was the sale by the plaintiff of these 9000 shares of stock to the nine executives at \$320 a share for cash. That is covered by Section 11 of the stipulation. We do not need to produce any testimony on that. When we put the plaintiff on the stand we will show the date that we got that cash.

By MR. IVINS:

Q. Mr. du Pont, just two more questions. Exhibit Q annexed to the stipulation is a letter from you to Mr. P. S. du Pont. It is the letter of March 10, 1921, that Mr. Lewis referred to in his opening, which I had through oversight not mentioned, although I recited it in the memorandum prepared for the Court. You call the attention of Mr. P. S. du Pont to a talk had on the subject of his embarrassment in regard to the sale of 1000 shares of du Pont stock to each of the executives at \$320 a share, which sale has proven on paper at least very disadvantageous to the committee-men. You point out that they are not the kind of men who

would squeal to get out of a contract that they had entered into with their eyes open, but indicated that you thought it would be for the best interest of everybody concerned, that they should be relieved of their worry, and you annexed thereto some schedules showing different plans for curing the situation.

Now, had any member of the executive committee at that time approached you and expressed concern regarding his financial concern arising out of the transaction?

A. I was aware of the feeling on part of at least two of them that they were very much worried financially; but they did not make any plan or suggestion that I should do anything about that. It was done voluntarily.

Q. It was voluntary on your part?

A. Yes, sir.

MR. IVINS: Thank you, sir. You can cross-examine, Mr. Lewis.

MR. LEWIS, JR.: I believe that with a few minutes consideration, we will agree there is no cross-examination for Mr. du Pont.

THE COURT: All right, suppose you take that. Will you be seated, Mr. du Pont.

MR. LEWIS, JR.: We have no cross-examination.

(Witness excused.)

MR. IVINS: Now Mr. Pierre S. du Pont.

PIERRE S. DU PONT.

PIERRE S. DU PONT, was called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. IVINS:

Q. What is your full name, Mr. du Pont?

A. Pierre S. du Pont.

Q. Are you the plaintiff in this proceeding?

A. Yes.

Q. What is your business or occupation?

A. Looking after my investments, and I am also an officer of the du Pont de Nemours Company.

Q. And was your business the same in 1919?

A. Substantially so. I was a little more active in the du Pont business at that time, but substantially the same thing.

Q. And in 1931?

A. Yes.

Q. What portion of your time do you devote to your investment business?

A. I should think the greater part of my time is looking after investments in general.

MR. LEWIS, JR.: You mean now, or then?

THE WITNESS: At the time.

MR. LEWIS, JR.: In 1919?

THE WITNESS: Yes.

Q. And was that also true in 1931?

MR. LEWIS, JR.: Now?

Q. I will put the same question.

A. Yes, but possibly in a slightly lesser degree.

THE COURT: I do not think the record is quite clear on that point. I think you had better ask the question again, if you will, Mr. Ivins.

Q. The question was—what portion of your time, I mean to indicate in 1919, did you devote in 1919, to your investment business?

A. I should think more or less 50 per cent. at a guess, perhaps.

Q. And what portion of your time did you devote to your investment business in 1931?

MR. LEWIS, JR.: I object to that. I do not see how in the world it could make any difference than in 1931.

MR. IVINS: You are right, Mr. Lewis.

Q. I should have said in 1929.

MR. LEWIS, JR.: I do not see that makes any difference. I object to that. That is the date the new contract with the Delaware Realty Company was made. I object.

MR. IVINS: In 1929, his contract with the Christiana Securities Company ran out, and he had to replace the stock he borrowed from the Christiana Company. He had to get that somewhere. He went to the Delaware Realty Company, and got it there, and he had to make a new contract with the Delaware Realty Company on new terms.

Now, we say that that might put a very different face on things. Even if under some theory it could be said he did not enter into the original transaction for profit when he was forced to close up that original transaction, and had to borrow stock to do it with, he was entering into a new transaction, which may have been for profit or may have been to avoid loss, which is the same thing; and so at that time it may be important what his business was.

THE COURT: I have grave doubt as to its admissibility, but I think in view of the fact that we are sitting here without a jury, I will admit it, and I will save you an exception, Mr. Lewis.

A. I have an office in Wilmington and one in New York, for business purposes. I am practically in one of them, practically every day. I think almost every day some question concerning my personal business comes before me.

Now, as to the amount of time expended, it is difficult to say, but I am there almost every day, and there is almost every day a question comes up of business for me. I maintain an office force for that purpose.

Q. In 1919, did you have an office in Wilmington?

A. In 1919, yes.

Q. And in 1931?

A. In Wilmington, yes.

Q. And when did you have offices in New York which you have just spoken of?

A. Starting about 1920.

Q. How many people did you employ in your office in 1919?

A. It was practically the same number as I have now. I should say seven or eight.

Q. And did they devote their entire time to your business affairs?

A. Yes.

THE COURT: Mr. Ivins, when you ask him the business, you mean his business of handling and taking care of his investments?

MR. IVINS: Yes, I meant to exclude social secretaries, and other people who would be household employees or connections.

Q. Can you tell us, Mr. du Pont, in a general way, how your estate was invested in 1919?

A. I can not give you the percentages, but my largest percentage was in the E. I. du Pont de Nemours Company directly, and through the Christiana Securities Company. I was an owner of a large block of du Pont stock. I also had other investments in securities of different corporations.

Q. And were any of those securities in brokerage accounts?

A. Practically no. There may have been a small brokerage account, but practically no.

Q. Did you change any of your investments in 1919?

A. Yes, I think there are probably quite a number of transactions.

Q. Were you an officer or director of any other corporations besides the du Pont Company and the Christiana Securities Company?

A. I was director of General Motors Corporation at that time, I believe. I was director of the Chatham & Phoenix Bank, and I think the Philadelphia National Bank, and I believe the Bankers Trust Company of New York, about that time.

Q. In these companies in which you served as a director, were you a substantial stockholder?

A. I had stock, especially in General Motors, a very considerable amount of stock.

MR. LEWIS, JR.: I think he ought to say. "A substantial amount of stock" is so very indefinite.

THE COURT: You can clear that up on cross-examination, Mr. Lewis.

Q. In 1931, how were your investments?

MR. LEWIS, JR.: In 1931?

Q. Yes.

MR. LEWIS, JR.: I must object.

THE COURT: I have the same difficulty there, Mr. Ivins, but at the same time, I ruled before that in view of the fact that we were sitting without a jury, I will admit it.

MR. LEWIS, JR.: That was 1929.

THE COURT: You are right. How does 1931 become pertinent here?

MR. IVINS: 1931 is the taxable year. One of the questions is—was this deduction in connection with his business? We have got to know what his business was in 1931. He might have had a business in 1919 which he had gone completely out of, and tried to take a deduction in 1931.

THE COURT: You are offering this for the purpose of exclusion, that is, to show that his business was substantially the same?

MR. IVINS: Yes, and to show that he was in the business of an investor; and from that we make our argument that that is a reasonable expense of that business as an investor.

MR. LEWIS, JR.: Will your Honor hear me on that?

THE COURT: Yes.

MR. LEWIS, JR.: My point is this: It does not make a particle of difference what business Mr. du Pont was in, in 1931, because this expense did not occur in connection with this business, or grow out of his business in 1931. It was occasioned by a transaction which I think was in 1919, which your Honor has ruled on. The thing that occasioned this payment is the only thing we are interested in. It does not make any difference what business Mr. du Pont was in, in 1931, because it did not occasion this payment.

THE COURT: Mr. Ivins, I am inclined to agree with the Government's contention in regard to this, but I am not clear about it, and I will admit it, saving an exception. Proceed, therefore.

By MR. IVINS:

Q. How was your estate invested in 1931; I mean to ask the same question as for 1919, to draw out whether there was any difference?

A. My interest in E. I. du Pont de Nemours was very much less. I was still a large investor in General Motors Corporation, I believe more so than in 1919.

Q. In 1929, at the time that you settled up with the Christiana Securities Company and borrowed du Pont stock from the Delaware Realty Company, were your investments divided up about the same way?

A. My general investments were larger that year than they were in 1931; that is, larger in kind.

MR. LEWIS, JR.: As I understand it, this is taken subject to my objection?

THE COURT: Yes. Let this testimony be taken subject to a general objection by Mr. Lewis, to this whole line, in effect.

MR. IVINS: Certainly.

Q. You had diversified investments but in large part in du Pont and General Motors stocks in 1929?

A. In 1929 I had parted with a large part of my E. I. du Pont de Nemours & Company stock. My interest then was practically all in the Christiana Company, and the General Motors stock at that time was larger than the du Pont interest, I believe.

Q. But the Christiana Company at that time continued to hold du Pont stock?

A. Yes, practically its entire holding was of du Pont stock.

Q. In 1931, were any of your securities in brokerage accounts?

A. I believe nothing whatever.

Q. Did you change any of your investments in 1931?

A. I believe so, yes. There were quite a number of transactions.

Q. Did you change your investments in 1929?

A. Yes, I believe there were more transactions than in 1931.

THE COURT: Mr. Ivins, I do not believe I get the point of your question as to whether or not there was securities in brokerage accounts. What is the point? I do not see the significance of that.

MR. IVINS: It was merely to bring out the fact that he is, or was, in those particular years certainly, regarded as an investor, rather than a speculator or trader.

Q. Were you at any time an officer or employee of the du Pont Company?

A. Yes.

Q. When did you first become connected with that company or its predecessor?

A. In 1890.

Q. And will you tell us the various offices you held in the predecessor companies, and this du Pont Company?

A. I was treasurer in 1902, until almost the time I was made president, which was in 1915. I retired as president in 1919, and became chairman of the board of directors.

Q. Do you still hold that office?

A. I still hold that office, yes.

Q. What has been your policy as one of the high officers of the du Pont Company, with respect to important or valuable employees?

MR. LEWIS, JR.: Just a minute. May I ask the stenographer to read that. (Question repeated as recorded.)

A. The policy of the company which I have always believed in, was to pay the prominent men who were responsible for the conduct of the company's affairs, good salaries, and if possible, have an interest in the company as a stockholding.

Q. Now, did you consider the price of \$320 a share, at which you sold the stock we have been discussing, to the members of the executive committee, to be a reasonable and fair price?

A. I did.

MR. LEWIS, JR.: I object to that, but your Honor rules against me.

THE COURT: The same ruling with respect to that question.

MR. IVINS: I may say this in that connection, your Honor. We had gathered from conferences with the defense, in preparation of the stipulation, and previous conferences in the Bureau of Internal Revenue, that the defense was likely to take a position that this sale at \$320 a share, should be regarded in part, at least, as a

gift, because they asked us at one time to stipulate that the market value of the stock at that time was substantially a higher figure; and it is for that reason that I have developed this evidence, and have no evidence to develop along the line, that the \$320 was a reasonably fair price for a large block of stock; and that the mere fact that very small blocks had been selling at higher prices, would not affect those market figures.

If the defense is willing to state that they have no intention of claiming that this sale was in any part a gift, or the equivalent of a gift, because of the difference between the prices at which the sale was made, or any market price, or any price they might prove, it will save me a lot, and I will drop that line.

MR. LEWIS, JR.: I am sorry I can not make that stipulation.

THE COURT: I have already ruled with respect to that. Proceed.

Q. The question was, Mr. du Pont, did you consider the price of \$320 a share, as a fair price for the stock?

THE COURT: There is an objection and exception. Objection overruled and exception entered.

A. I did.

Q. Did you regard it as less than the fair market value?

THE COURT: I assume that Mr. Lewis's objection goes to this whole line.

MR. LEWIS, JR.: Certainly.

THE WITNESS: Shall I answer that?

Q. Yes.

A. I believe it was the fair market value, yes.

Q. Do you recall having any discussions with any one, or more, of the nine executives to whom the stock was sold, with respect to the price that they were going to pay?

A. I have no recollection of dealing with any of those nine men, either as to price or otherwise, excepting as the deal was finally arranged and the payment was made to me and the stock transferred.

Q. And in the latter part of December, 1919, did you have available 9000 shares of du Pont common stock that you could have delivered?

A. No, I did not.

Q. How many shares did you have that were immediately available?

A. Seventy-four was all I had.

Q. Was that 74 shares the complete extent of your beneficial ownership in the du Pont Company?

MR. LEWIS, JR.: That has all been stipulated.

MR. IVINS: I withdraw it.

THE COURT: Very well.

MR. IVINS: I believe I have sufficiently called the attention of the Court to Exhibits N and O in the stipulation, which are the Chester County Hospital Trust that had 10,000 shares, and the Exhibit P, Delaware Trust, 14,000 shares, and the ownership by Christiana Securities, of common stock.

THE COURT: Yes, I have that in mind.

Q. Mr. du Pont, did any other individual have a greater beneficial ownership in the du Pont Company than you, in 1919?

A. I think I was the largest stockholder.

THE COURT: Just a moment. Is there objection?

MR. LEWIS, JR.: Yes, sir.

THE COURT: I think that objection must be sustained.

MR. IVINS: I think I have covered this point in Mr. Irene du Pont's examination. We had prepared the interrogatory for Mr. Pierre S. du Pont first, and some of the things in there were shifted to the other—

Q. Mr. du Pont, it is stipulated that you were paid in cash for the 9000 shares of stock?

A. That is correct.

Q. Do you recall when you received that payment?

A. It was immediately after this transaction was made, in 1919.

MR. IVINS: The stipulation contains Exhibits F, G, H and I, your Honor, which are supplemental agreements between Mr. du Pont and the Christiana Securities Company made each time a stock dividend was due, to recognize Mr. du Pont's enlarged obligation for the return of the stock.

The stipulation also contains as Exhibit R, a photostatic copy of a letter from Mr. du Pont to Mr. W. S. Carpenter. He was one of the nine committeemen, and the stipulation indicates that similar letters went to the other eight. It refers back to the letter of March 10, 1921, from Mr. Irene du Pont to Mr. Pierre S. du Pont, which we discussed while Mr. Irene was on the stand, in which it was pointed out that the value of the du Pont stock, having gone down, those executives were disturbed about their financial situation, and Mr. Irene suggested several remedies, possible remedies.

Exhibit R is the resulting letter that Mr. P. S. du Pont wrote direct to the executives. Instead of handing it back from Mr. Irene du Pont, he wrote directly to the executives, and referred to the letter of March 10th, from Mr. Irene du Pont, and made a proposition.

THE COURT: Mr. Ivins, it is now exactly 1 o'clock. I would suggest a recess until 2 o'clock.

MR. MORRIS: May it please the Court, we were wondering if, during the recess, we might expedite matters somewhat by inquiring if counsel care to indicate whether they have any more testimony. We think perhaps if they will not have any more witnesses, that if your Honor will allow a little longer recess, that during

the recess we may be able to state whether we shall have any testimony, if counsel care to indicate at this time.

MR. IVINS: I am afraid, since I can not be assured that the question of value is not in issue, that I will have to go ahead with my witnesses on that point.

MR. MORRIS: Then we have the usual recess.

THE COURT: The court will recess until 2 o'clock.

AFTER RECESS.

MR. IVINS: To obviate the necessity of further examination of certain witnesses, Mr. Lewis and I have agreed that Exhibit No. 16½, which was the list of stockholders of du Pont Company holding more than 1000 shares, might be in evidence, with the understanding that we would explain who had control of certain corporations in there, which might conceal the names of the beneficial owners.

The Christiana Securities Company was owned, all the stock thereof, owned by Pierre S. du Pont, Irene du Pont, Lamot du Pont, John S. Raskob, W. S. Carpenter, and several others—

THE WITNESS: I think that is R. B. M. Carpenter.

Q. R. B. M. Carpenter, and there are two du Pont Securities Companies mentioned in this list, the du Pont Securities Company holding 3412 shares, was a new corporation, formed in 1919, and I will ask Mr. du Pont, if you can, tell us who was back of that; do you remember?

A. When I spoke to you before, I thought it was a Securities Company used in connection with the General Motors Corporation, but that was only a few minutes ago. I recollect now that the du Pont Securities Company was organized by the E. I. du Pont de Nemours Company, to deal with certain securities owned by them, and I think this, in 1919, was probably that corporation; but I believe there were no

individual stockholders in that. I think it was entirely a company matter.

MR. IVINS: Thank you, sir. As to the other du Pont Securities Company indicated on this list to have 10,818 shares, that was the original name of the Christiana Company. It had been changed early in 1919 to Christiana Securities Company, but the stock records in the du Pont Company, of that block of stock held by it, had not been changed at the end of 1919. The Glendon Land Company was a holding corporation controlled by W. W. Laird, The de Nemours Investment Company was a corporation controlled by Alfred I. du Pont; and the Nobels Explosives Company was a large British corporation. I think that covers them all.

By MR. IVINS:

Q. Mr. du Pont, the agreement with the Christiana Securities Company, and its supplements, expired by its own terms, on December 1929. Was it renewed or extended?

A. It was not renewed. It ended, and the new agreement was formed through the Delaware Realty Company.

MR. IVINS: I refer the Court to paragraph 15 of the stipulation, and Exhibit S attached to the stipulation, which is the agreement of October 1929, between the plaintiff and the Delaware Realty and Investment Company. The provisions are similar to those that have been described in the agreements between Mr. du Pont and the Christiana Company, except that in the case of the Delaware Realty Company, he agreed not only to pay the equivalent of dividends declared on du Pont stock, but also any taxes that might be assessed against the Delaware Realty Company on account of the receipt of such moneys.

THE COURT: There was not any such provision in that agreement with Christiana, was there, about taxes?

MR. IVINS: There was no such provision in the written agreements.

Q. Mr. du Pont, did you make good to the Christiana Company, any taxes that they paid, by the payment you had made by this dividend equivalent?

A. I believe that was made good after it was declared that the Christiana dividends were not to be accounted as dividends but accounted as interest, because originally the Christiana Company reported those receipts as dividends, non-taxable to the Christiana Company, thereafter the tax board declared they should be considered as interest, and therefore taxable, and I believe after that they made that difference.

Q. Even though there was not any written provision in the contract to that effect?

A. That is so.

Q. Was the agreement with the Delaware Realty and Investment Company still in effect in 1931?

A. Yes.

Q. Is it still in effect today?

A. It is still in effect.

MR. IVINS: We offer in evidence as Plaintiff's Exhibit No. 19, the form of agreement, on Form 870. By this agreement the taxpayer waived his right to go to the Board of Tax Appeals with respect to a deficiency asserted of \$142,466.79; but that was without prejudice to his right to file and prosecute a claim for refund. It is so specifically indicated in the waiver.

THE COURT: It is admitted without objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 19.")

MR. IVINS: As Plaintiff's Exhibit No. 20, we offer the original letter from Deputy Commissioner Russell, to plaintiff, dated September 11, 1935. I have no more questions for you, Mr. du Pont, but I want to get this in before I turn you over for cross-examination.

(Received in evidence and marked "Plaintiff's Exhibit No. 20.")

MR. LEWIS, JR.: May I ask Mr. Ivins what is the purpose of this exhibit?

MR. IVINS: It shows the Commissioner's computation of the deficiency tax and how he arrived at it. It shows the disallowance of the deduction for this payment to the Delaware Realty Company, and ties up the date of that disallowance.

MR. LEWIS, JR.: The material part of the letter is all stipulated. It is stipulated that the taxpayer claimed these allowances with respect to certain payments, and did not claim them as to the others, and the Commissioner disallowed them. It is further stipulated that there is only one issue in this case, namely, the right to make these deductions. I think the exhibit is immaterial and irrelevant, and I object to it.

THE COURT: Mr. Ivins, I do not see the pertinency of the exhibit, in view of your stipulation.

MR. IVINS: I will be frank with the Court. The purpose of this exhibit and others I propose to offer afterwards, which are tied into this exhibit by reference, is because, true to the customary methods of the Bureau of Internal Revenue, they start one re-audit from an old one, and instead of going back to the beginning, to the return figures, they usually go back to the previous audit, or to a Revenue Agent's report, or something like that; so that in order to find out exactly what they have done, it is necessary to examine a string of letters; but my purpose in offering this and the other letters supporting it, is to show that the position of the Bureau of Internal Revenue was originally with respect to this taxable year, that the deductions we have been talking about should be allowed; and that later that position was reversed on the authority of the *Dart* case.

The *Dart* case is cited in the ruling, I believe, in one of those letters. The last letter refers to a previ-

ous one, and the next previous one refers to the Dart case, as their authority for their change of position.

THE COURT: That is stipulated, is it not; is not that part of your stipulation?

MR. IVINS: The stipulation merely shows that the final determination of the Commissioner disallowed the deduction.

THE COURT: Mr. Lewis, how does this hurt you?

MR. LEWIS, JR.: It hurts me by making part of this record something which is no part in the world of it. It makes no difference whatsoever why the Commissioner did it, or how many times he has changed his mind. We have stipulated in this record what he finally did. That is the only thing that matters in this law suit.

Now, it is proposed to put in a string of correspondence which may necessitate our putting in letters to explain; and I think it is immaterial and unnecessary.

THE COURT: Mr. Ivins, I believe that the issues here, that is, this issue has been sufficiently stipulated to be plainly on the record. I assume it is admitted, is it not, Mr. Lewis, that the reason why the Commissioner reversed himself, was the decision of the Board of Tax Appeals in the Dart case?

MR. LEWIS, JR.: That, coupled with certain decisions in the Supreme Court.

THE COURT: Yes, coupled with certain decisions in the Supreme Court, and that is admitted by the defendant.

MR. LEWIS, JR.: Oh, yes.

THE COURT: I do not think this is necessary, Mr. Ivins; I sustain the objection, and I note an exception if you desire it.

MR. IVINS: That will shorten the rest of it up very much.

By MR. IVINS:

Q. I would like to ask Mr. du Pont one other question. In 1929, when you made your first contract referred to here with the Delaware Realty Company, were you a stockholder of that corporation?

A. No.

Q. Have you ever been?

A. Never have been.

MR. IVINS: Thank you. Mr. Lewis, you may have the witness.

CROSS-EXAMINATION BY MR. LEWIS, JR.:

XQ. If the Court please, Mr. du Pont, there is some question in our minds about your statement as to the reference to the positions which you held in 1919. Would you mind repeating for me those, with the several companies you mentioned? You recall you were a director of several companies?

A. I think I was director of the General Motors Corporation, American International, I believe the Bankers Trust, but I am uncertain of that. I think also of the Wilmington Trust Company, and the Philadelphia National Bank, I think I mentioned that. If you want to know to a certainty, I can verify that.

XQ. I think if that is the best of your memory, that is sufficient for us.

A. That is going back a long way in my recollection on a point that is not clear. I will submit a list if you wish. May I say in that regard, I did occupy those positions or thereabouts, but I am not quite sure as to the exact date.

XQ. Did you occupy any other position than that of a director in 1919, with any of those companies?

A. I think not. I was made president of the General Motors Corporation in the latter part of 1920, I think it was but before, I think I was only a director.

XQ. Were you on any of the committees of the General Motors in 1919?

A. I am not sure about the finance committee. I can look that up if it is material. I became a member of its finance committee shortly after, I think.

XQ. That is just before you became president, or shortly before?

A. Just about that time. I think I was not before that, but I am not sure of that.

XQ. I think, Mr. du Pont, you said that continuously from 1919, until the present time, you were chairman of the board of the company which we have called the du Pont Company in this case; is that correct?

A. That is so, yes.

XQ. In 1919, did you occupy any other position with the du Pont Company other than chairman of the board?

A. I do not know that I got off—I am on the finance committee still, I think I was continually.

XQ. That is in 1919?

A. Yes, I think it has been continuous since then.

XQ. You have not, however, been a member of the executive committee?

A. No.

XQ. When you became president of the General Motors Company, you still were chairman of the board of the du Pont Company?

A. I think I retained that right through, yes.

XQ. And in each of those positions, you were paid salaries, were you not?

A. Yes.

XQ. Would you mind telling us how much the General Motors paid you when you became president?

A. \$100,000.

XQ. That is a year?

A. Yes.

XQ. And how much was the du Pont Company then paying you?

A. I think about \$10,000 or \$20,000. The president's salary, when I was president, was \$100,000. I think it was reduced to \$20,000 shortly after that.

XQ. I am afraid I do not quite understand that. You mean when you became chairman of the board, your salary was reduced?

A. Yes, in fact I think there was a lapse of six months when I did not draw any salary. I think it was forgotten. It was made up afterwards, and I am not sure how the record appeared.

MR. LEWIS, JR.: I am glad I was not in your position for those six months!

XQ. Now, comparatively what part of your time in 1921, was devoted to the business of the General Motors Company, as against the time you devoted to the business of the du Pont Company?

A. That is a very difficult question to answer, because my chief interest in the General Motors Corporation was on account of the du Pont Company. The du Pont Company helped finance the General Motors Corporation at that time to a very considerable extent; and it would be very difficult for me to say I represented the du Pont Company and the General Motors, and how far I represented General Motors and myself—it was a very mixed relation.

XQ. Well, your interest then I understand in the General Motors was to have been the promotion of the du Pont interest; the du Pont Company's interest in that business?

A. That was really the reason I was in there as president, yes.

XQ. How long did you continue as president of the General Motors Company, do you recall?

A. I should say until about 1924 or 1925, 1924 probably.

XQ. In 1924 or 1925, what was your—I will put it this way—strike the question—I got mixed up on that one. In 1924 I believe it was that you made a contract for an annuity with the Delaware Realty Company, put it this way, do you recall the incident when you did?

A. Yes.

XQ. That Delaware Realty Company is the same company from whom you later borrowed those 9000 shares of stock, is it not?

A. Yes.

XQ. Coming down to 1929, that is the time, as I understand it, when you changed your borrowing from the Christians to the Delaware Realty Company?

A. Yes.

XQ. What were you doing in that year; I mean by that, you were chairman of the board of the du Pont Company?

A. Yes, and member of the finance committee of the General Motors Company at that time.

XQ. But you were not president?

A. Not president, no.

XQ. But you still retained your interest in the General Motors, and the du Pont Company was heavily interested in the General Motors?

A. Quite heavily, yes.

MR. LEWIS, JR.: I may have one question more—thank you very much, Mr. du Pont. That is all.

(Witness excused.)

MR. IVINS: If the Court please, we have here a copy of the record sheets from the house of Laird & Company, brokers, whom Mr. Irene du Pont said were traders in du Pont stock in 1919, before it was listed on the Stock Exchange, which show their transactions therein from December 1st, 1919, on, for several months. I understand that the Government has no objection to the authenticity of the document, but reserves the right to object to its materiality.

Since we seem unable to eliminate the question of market value of the du Pont stock, at the time the sale was made, for \$320 a share, we offer this not only to show the fluctuations in prices that were going on, but

to show that the sales, at least those handled by those brokers, were all of comparatively very small lots.

THE COURT: Have you any objection to this, Mr. Lewis?

MR. LEWIS, JR.: I do not know where it came from. There was one stipulated.

MR. IVINS: That is the one. You reserved the right to——

MR. MORRIS: Is that filed with the Court?

MR. LEWIS, JR.: I have not made any objection to it.

MR. MORRIS: Counsel makes the suggestion that you have stipulated that so far as its authenticity is concerned, you won't question it, but you reserve the right to dispute its materiality. He now wants to know whether you dispute its materiality; have I stated that correctly, Mr. Ivins?

MR. LEWIS, JR.: I reserve the general right, and so I do object to anything mentioned in the stipulation for materiality. I have not objected to this, but I have objected to some other things.

MR. MORRIS: You do not object at this time?

THE COURT: It is in the stipulation?

MR. IVINS: It is in the stipulation. If they are going to object to materiality, I want to get that point raised and disposed of, but apparently they are not; but I propose to call Mr. Ellis for the purpose of showing that he has made a tabulation from the newspapers of that time. We have the newspapers here for check, but he made the tabulation, and I want to put him on the stand and introduce that tabulation.

RALPH T. ELLIS.

RALPH T. ELLIS, was called as a witness on behalf of the plaintiff, and having first been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. IVINS:

Q. Mr. Ellis, your full name is what?

A. Ralph T. Ellis.

Q. And your occupation?

A. Office assistant.

Q. To Mr. Pierre du Pont?

A. To Mr. Pierre du Pont, yes.

Q. I show you a document with pencil marked at the top "Exhibit 24." The title to it is "Quotations taken from bound copy book of newspapers in period October 1, 1919, to December 31, 1919, Every Evening." That is the name of the newspaper, a Wilmington newspaper, "Prices quoted on E. I. du Pont de Nemours Company common stock." I ask you if you compiled that?

A. I did.

Q. Where did you get the figures that are shown there?

A. With the dates indicated here, from the bound copy of *Every Evening*, from the Wilmington Public Library.

Q. Have you that bound copy here in court?

A. Yes, the book is here.

THE COURT: The tabulation has already been introduced as an exhibit; is that correct?

MR. IVINS: No; I am about to introduce it. I have marked Exhibit 24 on it.

Now, if the Court please, I offer as Plaintiff's Exhibit 21, the document just described by Mr. Ellis.

(Received in evidence and marked "Plaintiff's Exhibit No. 21.")

MR. LEWIS, JR.: If the Court please, the document, of course, is not properly authenticated for admission; but if counsel will ask the witness whether or not

Every Evening is a paper relied upon by the brokerage trade, to establish the prices (I do not know whether it is or not), I would like it properly authenticated.

MR. IVINS: I shall be glad to let you cross-examine.

MR. LEWIS, JR.: I will object unless you authenticate the source.

By MR. IVINS:

Q. Mr. Ellis, how many evening papers were published in Wilmington in 1919?

A. Two that I know of.

Q. What was the position held by *Every Evening*; was it that of a larger or smaller circulation?

A. *Every Evening* and the other evening paper were both about alike.

Q. Do you know whether the other evening paper carried stock quotations?

A. It did carry stock quotations.

Q. You did not refer to that other paper?

A. To the other paper?

Q. Yes.

A. No.

Q. You have not checked against that paper?

A. No.

Q. But *Every Evening*, the paper from which you copied this, carried New York Stock Market quotations?

A. New York Stock Market quotations, yes.

Q. And the Curb Market?

A. And the Curb Market.

Q. And it had on each day special little block for powder stocks?

A. It did.

Q. And these figures came out of the powder stock block?

A. I took them out of there.

Q. Except in the Wilmington papers, have you been able to find any regular day-to-day quotations of du Pont in the latter part of 1919, before it was listed?

A. I have not.

Q. Did you examine the files of New York papers for that?

A. I could not locate any in the New York papers that far back.

THE COURT: Do you renew your objection, Mr. Lewis? I conceive it is not fully proper to make proof of this issue, but now perhaps Mr. Ellis has not come within the technical requirements, but he can very readily do so by producing the actual papers themselves and putting them in evidence; but do you want to insist on that technical point?

MR. LEWIS, JR.: That is not the point of my objection.

THE COURT: Then I do not understand the point of your objection.

MR. LEWIS, JR.: My point is that a paper giving quotations must be shown to be a paper relied upon by those who buy and sell stocks before being admissible. I think it is very clear. I have not any objection if Mr. Ivins will assure me that this is such a paper. I simply know nothing about it.

THE COURT: I may say this, or my own knowledge, not my judicial knowledge, but my personal knowledge is that this paper was used in that period, I can assure you of that, Mr. Lewis.

MR. LEWIS, JR.: With your Honor's assurance, there is no objection.

THE COURT: That is correct.

MR. IVINS: That is all. Any cross-examination?

MR. LEWIS, JR.: No cross-examination.

(Witness excused.)

MR. IVINS: Now, Mr. Fisher.

MERRETT D. FISHER.

MERRETT D. FISHER, was called as a witness on behalf of the plaintiff, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. IVINS:

Q. Your name is Merrett D. Fisher?

A. Yes, sir.

Q. You are secretary of the finance committee of the du Pont Company?

A. Yes.

Q. And you have custody of the records of the finance committee?

A. Yes.

Q. Have you brought here the records from the files of that committee, which show the transfers that were made in October, November and December, 1919, and January, 1920, of the common stock of the du Pont Company?

A. Yes.

Q. Can you tell me from those records how many shares of du Pont common stock were transferred on the books of the company, and the period from September 22, 1919, to October 25, 1919?

A. 67,740 shares.

Q. Were 65,000—

MR. LEWIS, JR.: Do not lead him.

Q. All right. How many shares were transferred by Mr. Alfred I. du Pont?

A. 65,449.

Q. And to whom were they transferred?

A. To the de Nemours Investment Corporation.

Q. Is there a transfer there from the Trustee for H. Belin du Pont?

A. What was the question?

Q. Is there a transfer there from the Trustee for H. Belin du Pont?

A. Yes.

Q. To whom?

A. To Henry B. du Pont.

Q. Is Henry B. du Pont the same person as H. Belin du Pont?

A. Yes.

Q. How many shares were transferred?

A. 1564.

Q. Now, in the period from October 28th to November 21st, I do not know why these were not kept on even months, but they seem to have chopped them off at the ends of weeks I guess—what were the total transfers?

A. 4745 shares.

Q. Is there a transfer there from Alfred I. du Pont?

A. Yes.

Q. To whom?

A. To the Nemours Investment Corporation.

Q. How many shares?

A. 4000 shares.

Q. From November 22d to December 26th, what is the total number of transfers?

A. 11588.

Q. Does that include transfers to F. D. Brown, W. S. Carpenter, Jr., Lammot du Pont, A. Felix du Pont, J. B. D. Edge, C. A. Mead, C. A. Patterson, F. W. Picard and William C. Spruance?

A. It does.

Q. In how many shares?

A. 1000 shares.

Q. Is there a transfer in that period, from Alfred I. du Pont?

A. Yes.

Q. To whom?

A. Nemours Investment Corporation.

Q. How many shares?

A. 2000 shares.

Q. From the period of December 20, 1919, to January 24, 1920, what were the total transfers?

A. 590 shares.

MR. IVINS: You may cross-examine.

MR. LEWIS, JR.: I have no cross-examination.

MR. IVINS: Plaintiff rests.

MR. LEWIS, JR.: May we take a recess?

THE COURT: Suppose we take a recess for five minutes.

(After a short recess.)

MR. MORRIS: May it please your Honor, the Government will offer no testimony.

AS TO BRIEFS AND ARGUMENTS.

THE COURT: Then, gentlemen, we are left to the selection of some time for argument. I have endeavored to find out some period that might be convenient, whereby this court room might be used, and I will be sitting in Philadelphia in two-week periods from now until June.

I would suggest that the plaintiff's brief, and, in a separate printed document, plaintiff requests for findings of fact and conclusions of law, be filed on Monday, April 12th, if you will, Mr. Ivins, and put your requests for findings of fact in a separate printed document which I think will be helpful to the Court.

MR. IVINS: I shall be glad to do that.

THE COURT: And Mr. Lewis and Mr. Morris, if you would have your brief, and in a separate printed document, your requests for findings of fact and conclusions of law, by Friday, April 30th, would that give you sufficient time?

MR. LEWIS, JR.: Yes, I think so.

THE COURT: And then the plaintiff's reply brief on May 10th.

I suggest the argument be held, if agreeable to counsel and convenient to counsel, on Thursday, May 13th, at 10 o'clock A. M., and I will be prepared at that time to give

the respective sides as much time for the oral argument as they may desire.

MR. IVINS: That will be very satisfactory to us.

THE COURT: Is that agreeable to you?

MR. LEWIS, JR.: Yes.

THE COURT: This court will then recess until 4:30 this afternoon.

MR. MORRIS: Will your Honor indulge us one moment?

THE COURT: Yes.

MR. MORRIS: Mr. Lewis suggests, if the Court please, that the only possible thing that might delay us, is the delay against the briefs and other papers printed through the Government Printing Office. If we are not able to get them printed then, will your Honor take a typewritten copy?

THE COURT: Certainly.

The court will recess until 4:30.

(Whereupon, at 3:05 P. M., the taking of testimony was concluded.)

PLAINTIFF'S EXHIBIT NO. 1.

(Copy.)

9012 du Pont Building,
Wilmington, Delaware,
June 23, 1919

FINANCE COMMITTEE
from P. S. du Pont:

SALARIES

I recommend that a committee be appointed to study the question of proper compensation to the members of the new Executive Committee with the request that this committee investigate methods adopted by other corporations toward the securing and retaining of men in similar valuable positions. The salaries now being paid by the du Pont Company do not seem sufficient to insure best results for any length of time.

CHAIRMAN OF THE BOARD

(s) P. S. du Pont

.12

PLAINTIFF'S EXHIBIT NO. 2.

EXTRACT FROM MINUTES OF FINANCE COMMITTEE MEETING
#144

JUNE TWENTY FIFTH 1919

E. I. DU PONT DE NEMOURS & COMPANY

COMPENSATION TO EXECUTIVE COMMITTEE MEMBERS

Upon recommendation of the Chairman, as per letter of June 23, 1919 (#998), the following resolution was offered and unanimously adopted:—

RESOLVED, that the Chairman appoint a Committee of one to study the proper method of compensating the members of the Executive Committee.

The Chairman thereupon appointed Vice President H. F. Brown to make the above-mentioned study.

PLAINTIFF'S EXHIBIT NOS. 3 AND 4.

[Omitted by consent. Minutes of executive committee extending time of sub-committee to report.]

PLAINTIFF'S EXHIBIT NO. 5.

**EXTRACT FROM MINUTES OF FINANCE COMMITTEE MEETING
#150**

AUGUST TWENTY SEVENTH, 1919

E. I. DU PONT DE NEMOURS & COMPANY

**COMPENSATION TO MEMBERS OF THE
EXECUTIVE COMMITTEE**

In compliance with action taken at meeting June 25, 1919, a further report was received from Vice President H. F. Brown dated August 19, 1919. (#1378) on the above mentioned subject. After discussion, the following resolution was offered and unanimously adopted:

RESOLVED, that a committee of three be appointed, with Mr. H. F. Brown as Chairman, to make recommendation of compensation for members of the Executive Committee:

RESOLVED FURTHER, that copies of Mr. H. F. Brown's reports of August 4, 1919 (#1266) and August 19, 1919 (#1378) be referred to the members of said Committee for their information.

The Chairman thereupon appointed the following committee:

**Mr. H. F. Brown, Chairman,
Mr. Irene du Pont,
Mr. J. J. Raskob**

I, M. D. Fisher, Secretary of the Finance Committee of E. I. du Pont de Nemours & Company, and custodian of the records of said Committee, do hereby certify that the above is a true and correct copy of extract taken from the original minutes of said Finance Committee.

M. D. FISHER

Secretary, Finance Committee

E. I. du Pont de Nemours &
Company

(Seal)

PLAINTIFF'S EXHIBIT NOS. 6, 7, 8 AND 9.

[Omitted by consent. Minutes of executive committee extending time of sub-committee to report.]

PLAINTIFF'S EXHIBIT NO. 10.

November 11th, 1919.

TO: FINANCE COMMITTEE,

FROM: SUB-COMMITTEE.

Your committee appointed to study the matter of proper compensation for members of the Executive Committee beg to make the following recommendations:

1st:—that E. I. duPont de Nemours & Company enter into an annual contract with each member of its Executive Committee, agreeing to pay him a salary of \$30,000. per annum, and in addition thereto, an amount equal to 1% of the annual net earnings of the Company in excess of 10% on the net capital invested as shown by the books of the Company at the beginning of each year. In determining earnings and net capital invested, there shall be excluded earnings and capital invested in DuPont American Industries to the extent that such are shown on the books of E. I. duPont de Nemours & Company. For example, the net capital employed as shown on balance sheet of September 30th, 1919 is determined as follows:

Debenture stock outstanding	\$60,813.950.
Common stock outstanding	\$58,854,200.
Surplus	\$71,226,894.

Total	\$190,895,044.
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Less: amount of DuPont American Industries investment as shown on books...	\$ 49,045,300.
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Balance	\$141,849,744.
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equals net capital employed for the purposes contemplated herein.

The amount of such additional compensation shall be invested in common stock of the Company at current market prices and certificates for such common stock shall be delivered to the individuals as soon after the end of each year as it is possible to determine the earnings and have certificates issued. Should it be impossible to purchase common stock at prices which to the Finance Committee seem reasonable, the additional compensation may be paid either in cash or in debenture stock at the discretion of the Finance Committee.

These contracts may be terminated by either party on thirty days written notice, in which event settlements shall be made to the date of such termination.

There is attached hereto a table showing the results of this plan under various assumed earnings.

2nd: This form of contract, if adopted, makes it desirable, and we recommend, that the Bonus Plan be amended as follows:

(a) to exclude members of the Executive Committee from participation under the "B" Bonus Plan and

(b) in such other ways as this new relationship with members of the Executive Committee who are excluded from the "B" Bonus Plan may dictate as being desirable. It would seem desirable, for instance, to exclude from net earnings as now defined under the Bonus Plan, all divi-

dends or earnings received by the Company from its investments in DuPont American Industries.

3rd: The Company shall issue from its Treasury 1,000 shares of common stock at \$400. per share to be held in trust for each member of the Executive Committee under the following terms and conditions, to-wit:

(a) On January 1st, 1925, there shall be credited to each member of the Executive Committee on account of this trust, \$150,000, provided that he is still a member of the Executive Committee at that time or is occupying a position which has been approved by the Finance Committee and being a position of equal importance, and in this event, said beneficiary shall have the right to acquire said 1,000 shares of stock by the payment of \$250,000. in cash, subject to interest and dividend adjustments as hereinafter provided.

(b) During the period of this Trust, all dividends paid on said stock shall be credited to the account of said beneficiary and said account shall be charged with interest at the rate of $4\frac{1}{2}\%$ per annum.

(c) In the event of the death of a beneficiary hereunder prior to January 1st, 1925, there shall be credited to his stock trust account \$150,000. with interest and dividend adjustments and his estate shall have the privilege of purchasing said 1,000 shares of stock for \$250,000. cash with interest and dividend adjustments provided this privilege is exercised within six months after the date of his death.

7/-

H. F. BROWN
IRENEE DU PONT
J. J. RASKOB

CAPITAL INVESTED	ASSUMED EARNINGS		PAID TO EXECUTIVE COMMITTEE		TOTAL ANNUAL AMOUNT TO EXECUTIVE COMMITTEE IN- CLUDING CREDIT ON STOCK PURCHASES	
	% Capital Invested	Amount	Amount	% of total Earnings	Amount	% of total Earnings
\$140,000	10%	\$14,000	0	0	\$270	% 1.90
\$140,000	11%	\$15,400	\$126	% .82	\$396	% 2.57
\$140,000	12%	\$16,800	\$252	% 1.50	\$522	% 3.10
\$140,000	13%	\$18,200	\$378	% 2.08	\$648	% 3.56
\$140,000	14%	\$19,600	\$504	% 2.57	\$774	% 3.95
\$140,000	15%	\$21,000	\$630	% 3.00	\$900	% 4.28
\$140,000	20%	\$28,000	\$1,260	% 4.50	\$1,530	% 5.46

NOTE—"000" omitted.

(NO EXHIBIT NO. 11.)

PLAINTIFF'S EXHIBIT NO. 12.**EXTRACT FROM MINUTES OF FINANCE COMMITTEE MEETING
#158****NOVEMBER TWELFTH, 1919.****E. I. DU PONT DE NEMOURS & COMPANY****QUESTION OF COMPENSATION TO EXECUTIVE
COMMITTEE MEMBERS:**

In compliance with action taken at meeting August 27, 1919, report was received from the Sub-Committee consisting of Messrs. H. F. Brown, Irene du Pont and J. J. Raskob dated November 11, 1919 (#1876) in connection with the above-mentioned subject. After full discussion, it was moved and unanimously carried, (Vice President Lamont du Pont not voting) that this report be referred back to the Sub-committee with the suggestion that consideration be given to the question of making some provision for securing possession of the Common Stock in the event of the death of a beneficiary, and with the additional suggestion that the Sub-Committee confer with the Legal Department and have suitable contracts prepared for consideration by this Committee at our next regular meeting.

PLAINTIFF'S EXHIBIT NO. 13.

[Omitted by consent. Minute of executive committee extending time of sub-committee to report.]

PLAINTIFF'S EXHIBITS NOS. 14 AND 15.

[Omitted by consent. These were a letter from H. Fletcher Brown, vice-president of du Pont Company, to Richard V. Lindebury, dated December 3, 1919, requesting opinion on proposed agreement between company and executives, and Lindebury's reply, dated December 8, 1919, advising against such action. These exhibits are summarized in paragraph 11 of District Court's findings of fact.]

PLAINTIFF'S EXHIBIT NO. 16.

[Omitted by consent. Minute of executive committee extending time of sub-committee to report.]

PLAINTIFF'S EXHIBIT NO. 16½.

STOCKHOLDERS OF E. I. DU PONT DE NEMOURS & COMPANY
1,000 SHARES OR OVER—COMMON STOCK
AS OF DECEMBER 31, 1919

E. Ahuja	1,530	Pierre S. du Pont &	
Julia du Pont Andrews	1,091	Ethel H. du Pont,	
John Aspinwall	2,320	guardians of	
Ethel du Pont Barks-		Paulina du Pont	1,321
dale	3,764	do—of Samuel	
Hamilton M. Barksdale	3,718	Hallock du Pont	1,322
Margaretta E. Belin	3,002	do—of Wil-	
F. Donaldson Brown	1,307	hemina H. du	
H. F. Brown	2,587	Pont	1,321
Susy W. Buckner	1,004	William du Pont	28,000
Mary W. Carpenter	1,100	DuPont Securities	3,412
R. R. M. Carpenter	1,645	DuPont Securities	10,818
Walter S. Carpenter,		Mary L. Fenn Earn-	
Jr.	1,381	shaw	2,266
Christiana Securities	163,182	Jas B. D. Edge	1,305
Frank L. Connable	1,057	R. W. Ellis	1,000
Louisa d'A duPont		Joseph R. Ensign	2,906
Copeland	3,000	Equitable Trust Co.	
Julia W. E. Darling	2,598	Trustee u/d of	
A. Felix duPont	4,636	Trust dated	
Alexis I. du Pont	4,965	11/26/12	1,464
Alexis I. & Eugene		William H. Fenn, Jr.	2,456
du Pont Trus. for		Fidelity Trust Co.	
Amelia du Pont		Trustee u/w of	
u/w Eugene du		Alexis I. du Pont	
Pont	2,582	for Eliz. duP.	
do—for Julia S.		Bayard	3,184
duPont	2,582	do—for Eliz. B.	
do—for Anne du		du Pont	6,368
Pont	2,582	do—for Alice	
Alfred I. du Pont	4,100	duP. Ortiz	3,184
Amy E. du Pont	1,091	Sophie du Pont Ford	1,126

Plaintiff's Exhibit No. 17

187

Archibald M. L. du Pont	2,524	Glenden Land Company	2,000
E. I. du Pont de Nemours & Co	2,365	Willis F. Harrington	1,031
Ernest du Pont	4,186	Elizabeth D. Haskell	1,356
Ethel du Pont	2,164	Harry G. Haskell	1,002
Eugene du Pont	5,155	C. B. Holladay	1,500
Eugene E. du Pont	5,085	Tilghman Johnston & Walter Blackson, Trustee Estate of Wm. G. Ramsay	1,807
E. Paul du Pont	1,683	C. A. Meade	1,168
Francis I. du Pont	2,080	Susan A. E. Morse	2,619
Francis I., A. Felix & Ernest du Pont Tr. for Irene S. du Pont, u/w Francis G. du Pont do—for Eleanor du Pont Perot	2,445	Nemours Investment Corp.	71,449
Henry B. du Pont	1,564	Nobel's Explosives Co. Ltd.	1,442
H. F. du Pont	22,802	Chas. A. Patterson	1,805
Irene du Pont	2,785	Anne Peyton	1,091
Irene du Pont, John J. Raskob & William Winder Laird Trus. under trust deed dated 7/29/19	14,000	F. W. Pickard	1,464
Lammot du Pont	6,000	H. M. Pierce	1,231
Marianna du Pont	2,100	J. G. Reynolds	1,300
Philip F. du Pont	5,908	John L. Riker	4,734
		May Saulsbury	1,028
		H. Rodney Sharp	1,013
		H. Rodney Sharp, Trustee u/a dated 11/30/18	10,000
		Isabella du Pont Sharp	1,842
		W. C. Spruance	1,035
		F. G. Tallman	1,035

In pencil.

588,542

486,320

PLAINTIFF'S EXHIBIT NO. 17.

[Omitted by consent. Minute of executive committee extending time of sub-committee to report.]

PLAINTIFF'S EXHIBIT NO. 18.**E. I. DU PONT DE NEMOURS & COMPANY****FINANCE COMMITTEE**

Meeting #162 (Special Meeting), held at the office of the Company, Wilmington, Delaware, 3.00 p. m., December 16, 1919.

PRESENT: Ireneë duPont
H. F. Brown
R. R. M. Carpenter
Wm. Coyne
H. G. Haskell
F. G. Tallman
J. J. Raskob
ALSO: J. P. Laffey
V. S. Thomas
ABSENT: P. S. duPont
H. F. duPont
Lamot duPont
F. L. Connable

In the absence of the Chairman, Mr. Ireneë duPont was chosen Chairman pro tempore.

QUESTION OF COMPENSATION TO EXECUTIVE COMMITTEE MEMBERS:

In accordance with understanding reached at meeting held yesterday, December 15th, the Legal Department presented tentative forms of contracts with members of the Executive Committee, and after full discussion the following resolution was offered and unanimously adopted:

RESOLVED, that the Legal Department be requested to proceed immediately with the drafting of contracts covering compensation to Executive Committee members along the lines of the tentative forms presented at this meeting, and to advise this Committee their con-

clusions as to whether the making of such contracts should be submitted to the stockholders for approval.

The following resolution was then offered and unanimously adopted:

RESOLVED, that the President be authorized to say to the members of the Executive Committee that the Finance Committee have under consideration the working out of an arrangement with each member of the Executive Committee under which, in lieu of their participation in the "B" Bonus Plan of the Company, they will have a definite contract under which they will receive

(a) \$30,000. per year salary;

(b) \$150,000. at the end of five years if they are still in the employ of the Company as members of the Executive Committee or occupy some other position approved by the Finance Committee as equivalent thereto;

(c) One percent. (1%) of the annual net earnings of the Company received from the capital employed under their direction after deducting 10% on the amount of said capital as shown on the books of the Company; such additional compensation to be payable in common stock of the corporation at cost if same can be secured at prices which in the opinion of the Finance Committee seem reasonable, otherwise payable in cash.

The Company will also pay the premiums on a \$150,000. life insurance policy on the life of each member of the Executive Committee for five years.

RESOLVED FURTHER, that these contracts be submitted to the stockholders for approval, if our attorneys determine this to be necessary or advisable.

The following resolution was also offered and unanimously adopted:

RESOLVED, that report from the Sub-Committee dated November 11, 1919 (#1876), be received and ordered filed.

Upon motion, the meeting was adjourned.

This is to certify that the foregoing is a true and correct copy of minutes of meeting of **FINANCE COMMITTEE** of **E. I. DU PONT DE NEMOURS & COMPANY** held on December 16, 1919.

M. D. FISHER

Assistant Secretary

E. I. duPont deNemours & Company

29

PLAINTIFF'S EXHIBIT NO. 19.

[Omitted by consent. Waiver extending the statute of limitations for assessment and collection of income taxes.]

[NO EXHIBIT NO. 20.]

PLAINTIFF'S EXHIBIT NO. 21.

**Quotations Taken from Bound Copy Book of Newspapers
in Period October 1, 1919 to December 31, 1919—
"Every Evening," Wilmington Evening Newspaper
Prices Quoted on E. I. du Pont de Nemours & Company
Common Stock.**

October, 1919

December, 1919

1	311 — 317
2	315 — 320
3	315 — 320
4	315 — 320
6	315 — 320
7	315 — 320
8	315 — 320
9	315 — 320
10	315 — 320
11	315 — 315
13	Holiday 0
14	315 — 325
15	315 — 325
16	315 — 325
17	315 — 325
18	315 — 325
20	320 — 330
21	320 — 330
22	320 — 330
23	340 — 350
24	340 — 350
25	340 — 350
27	340 — 350
28	350 — 365
29	350 — 375
30	380 — 405
31	400 — 425

1	375 — 390
2	375 — 385 Ex. Div.
3	365 — 380 Ex. Div.
4	365 — 380 Ex. Div.
5	365 — 380 Ex. Div.
6	365 — 380 Ex. Div.
8	No Paper
9	365 — 380 Ex.
10	365 — 380 Ex.
11	365 — 380
12	365 — 380
13	370 — 380
15	370 — 380
16	370 — 380
17	370 — 380
18	370 — 380
19	370 — 380
20	370 — 380
22	370 — 380
23	
24	370 — 380
25	Holiday
26	370 — 380
27	360 — 376
29	360 — 376
30	360 — 375
31	360 — 375

November, 1919

1	400 — 425
3	400 — 425
4	Election
5	400 — 435
6	410 — 420
7	410 — 420
8	410 — 420
10	410 — 425
11	410 — 425
12	400 — 420
13	400 — 420
14	400 — 420
15	380 — 400
17	380 — 400
18	380 — 400
19	380 — 400
20	380 — 400
21	380 — 410
22	380 — 410
24	No paper
25	380 — 410
26	380 — 410
27	
28	380 — 410
29	375 — 380

And, thereafter, on April 12, 1937, the plaintiff requested the Court to make the following findings of fact and conclusions of law, viz.:

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

Plaintiff's requests for findings of fact numbered 1, 2, 3, 4, 6, 7, 8, 12, 14, 15, 19, 20, 24, 32, 34 and 35 are omitted by consent as they are identical with the similarly numbered findings of the District Court hereinafter printed. Plaintiff's requests for findings of fact numbered 5, 10 and

13 are omitted by consent being substantially identical with the similarly numbered findings of the District Court hereinafter printed. Plaintiff's request for findings of fact numbered 11 is omitted by consent as it is identical with the District Court's finding numbered 11, except that the last sentence in the court's finding was not included in the request.

9. On June 23, 1919, the plaintiff sent a communication to the finance committee of the du Pont Company in which he recommended that a committee be appointed to study the question of proper compensation for the members of the new executive committee. He stated that it did not seem that the salaries then being paid were sufficient to insure the best results for any length of time. [Ex. 1.]

16. On December 31, 1919, there were 6 stockholders of record who owned 9000 shares or more of du Pont Company common stock [Ex. 16½]. Of these six, two were trustees holding a total of 24,000 shares, under trusts created by the plaintiff. [Exs. O, P, Q. to Stip.]

17. Because of the doubtful legality of the issuance of stock by the du Pont Company to members of the executive committee, and because of the inability of the company to purchase 9,000 shares of its stock, except perhaps at exorbitant prices, plaintiff offered to sell 1000 shares of such stock to each of the members of such committee. [Exs. D and F to Stip.] He did not have available 9,000 shares of such stock for delivery. He had available only 74 shares. [Ex. 16½, Tr. 97.] He had a reversionary interest in two trusts which he had created which held 24,000 shares of such stock, which he expected to be returned to him within the next few years. [Exs. O, P, Q. to Stip.] He was then the owner of 29,125 shares of the common stock of Christiana Securities Company out of a total authorized, issued

and outstanding capital stock of 75,000 shares. The Christiana Securities Company was then the owner of 183,000 shares of the common stock of the du Pont Company out of a total 588,542 shares then issued and outstanding. [Stip. ¶¶ XIII and XII.] This direct and indirect ownership made the plaintiff the beneficial owner of more than a 16 per cent. interest in the du Pont company, an interest greater than that of any other single individual. [Ex. 16½.]

18. Pursuant to a resolution of its board of directors held on December 12, 1919 [Exs. C to E to Stip.], Christiana Securities Company and the plaintiff entered into a written agreement with the plaintiff on December 23, 1919, under which the Christiana Securities Company loaned 9000 shares of du Pont common stock to the plaintiff, said 9000 shares to be returned in kind within ten years. The plaintiff delivered as security for the return of said shares, 3800 shares of the stock of Christiana Securities Company, and agreed to pay to said company amounts equal to all dividends paid on said 9000 shares as and when such dividends were declared and paid. [Ex. D to Stip.]

21. The 9000 shares of du Pont Company common stock borrowed from Christiana Securities Company were delivered by the plaintiff, 1000 shares to each of the nine members of the executive committee, and the plaintiff received \$320,000 in cash from each of such members, a total of \$2,880,000. [Stip., XI, Tr. 98.]

22. The price of \$320 per share was arrived at as the result of a computation prepared by the treasurer of the du Pont Company which was intended to show the net asset value of the stock. [Ex. L to Stip.] It was considered a fair price by all parties concerned.

23. On March 10, 1921, Irene due Pont, president of the du Pont Company, addressed a communication to the

plaintiff in which he pointed out that the du Pont common stock was selling for around \$140 per share, that the sale by the plaintiff to the members of the executive committee of 1000 shares each at \$320 per share had proven (on paper at least) very disadvantageous to the committeemen, that some of them were materially disturbed over their financial situation; that they felt that it would be unethical for them to ask for any modification of the contract, but that in his opinion, they would assent to a modification if they were sure that the suggestion came from the plaintiff, and that it would eliminate any embarrassment which the plaintiff might have in the matter. He also stated that it was unfortunate that a number of the company's important men should have a financial worry to distract them, however little, from applying their utmost energy to the company's affairs. He suggested certain plans to meet this situation. [Ex. Q to Stip.]

25. The offer so made by the plaintiff was accepted by each member of the executive committee. [Stip., ¶ XIV.]

26. On June 15, 1920, the du Pont Company paid a stock dividend of $2\frac{1}{2}$ per cent. On September 15, 1920, the du Pont Company paid a stock dividend of $2\frac{1}{2}$ per cent. On each of these dates plaintiff delivered to Christiana Securities Company 225 shares of du Pont common stock, representing the stock dividends on 9000 shares. [Ex. G to Stip.] On December 15, 1920, the du Pont Company paid a stock dividend of $2\frac{1}{2}\%$ per cent. On December 27, 1920, plaintiff borrowed 450 shares of du Pont common stock from the Christiana Securities Company. [Ex. G to Stip.] On December 15, 1922, the du Pont Company paid a stock dividend of 50 per cent. On January 4, 1923, plaintiff entered into a new contract with Christiana Securities Company under which it was agreed that he was obligated to the Christiana Securities Company for 14,512 shares of du Pont common stock, and delivered to

the Christiana Securities Compnay additional collateral accordingly. In other respects the terms of the agreement of Decèmber 23, 1919, were continued. [Ex. F to Stip.]

27. On August 10, 1925, the du Pont Company paid a stock dividend of 40 per cent. On August 10, 1925, plaintiff entered into a new contract with Christiana Securities Company under which it was agreed that he was obligated to the Christiana Securities Company for 20,316 shares of du Pont common stock, and delivered to the Christiana Securities Company additional collateral accordingly. In other respects the terms of the agreement of December 23, 1919, were continued. [Ex. G to Stip.]

28. On October 28, 1926 the du Pont Company issued two shares of no-par common stock in exchange for each outstanding \$100 par share. On October 28, 1926, plaintiff entered into a new contract with Christiana Securities Company under which it was agreed that he was obligated to the Christiana Securities Company for 40,632 shares of no-par du Pont common stock. In other respects the terms of the agreement of December 23, 1919, were continued. [Ex. H to Stip.]

29. On January 21, 1929, the du Pont Company issued three and one-half shares of \$20 par value common stock in exchange for each outstanding no-par share. On January 21, 1929, plaintiff entered into a new contract with Christiana Securities Company under which it was agreed that he was obligated to the Christiana Securities Company for 142,212 shares of du Pont common stock. In other respects the terms of the agreement of December 23, 1919, were continued.

30. The agreement of December 23, 1919, between the plaintiff and Christiana Securities Company, which by its terms was to expire on December 23, 1929, was not renewed or extended.

31. On October 25, 1929, plaintiff entered into a written agreement with Delaware Realty & Investment Company, a

corporation in which he was not a stockholder, under which said company agreed to and did loan to the plaintiff 142,212 shares of du Pont Company common stock to satisfy his then obligation to Christiana Securities Company, said number of shares plus any increases by stock dividends or otherwise to be returned by the plaintiff within ten years. The 142,212 shares of du Pont Company stock were received by the plaintiff and were delivered by him to Christiana Securities Company in discharge of his obligation under the contract described in findings 16 and 24-27 above. [Stip., ¶ XV.] This agreement required the deposit of certain collateral. It further required the plaintiff to pay to said company an amount equivalent to all cash and property dividends declared and paid on said 142,212 shares, so borrowed, plus any increase thereof by stock dividend or otherwise, or any balance of said shares which might be owing under the agreement, as and when said dividends were declared and paid by the du Pont Company. It also provided that should any lawful tax liability, Federal or State, accrue against and be paid by Delaware Realty & Investment Company, which liability, but for the execution of said agreement, otherwise would not accrue, plaintiff, upon being notified thereof, would reimburse said company for all such taxes, together with all interest and penalties that might be levied or imposed in respect thereof. [Ex. S. to Stip.]

The first sentence of plaintiff's request numbered 33 is omitted by consent as being identical with the District Court's finding similarly numbered and hereinafter printed. The balance of plaintiff's request numbered 33 reads:

In 1933 the Commissioner of Internal Revenue determined that said \$80,063.56 paid by plaintiff to the Delaware Realty and Investment Company in 1931 was income to said company in that year, and that an additional tax was due thereon. The plaintiff was called upon to and did in 1933 reimburse said company on account of said additional tax in

the amount of \$9,607.98 together with interest thereon in the amount of \$663.98, a total of \$10,271.60. [Stip., ¶ XVII.]

36. The plaintiff had in 1919, 1929 and 1931, large and diversified investments in stocks and securities. His direct and indirect beneficial ownership in the du Pont Company in 1919, rendered him the largest individual beneficial owner in the du Pont Company. He had large investments in other stocks and securities. His gross income, as shown by his Federal income tax return for the year 1931, was: [Ex. A to Stip.]

Salaries, wages and commissions	\$ 20,640.78
Interest on bank deposits, notes, corporation bonds, etc.	336,748.05
Rents and Royalties	4,876.00
Dividends on stock of domestic corporations	1,475,046.54
	<hr/>
	\$1,837,311.37

Since resigning as president of the du Pont Company, as of May 1, 1919, he has devoted the greater part of his time to the management of his investments. In 1919 the plaintiff maintained an office in Wilmington, Delaware, for the conduct of his business affairs. [Tr. 84.] He had seven or eight employees in his office at that time. In 1920 he also maintained an office in New York for the conduct of his business. He has maintained both such offices ever since such years. The expense of maintaining such offices was \$36,310.67 in 1931. [Ex. A to Stip.] In 1931 plaintiff sold 63,345 shares of stock in various corporations in which he was a stockholder. [Ex. A to Stip.] He had substantial changes in his investments in 1919 and 1929.

37. The contract made by plaintiff with the Christiana Securities Company on December 23, 1919 was a transaction entered into for profit and in connection with his business of investor regularly carried on.

38. The contract made by plaintiff with the Christiana Securities Company on January 4, 1923 was a transaction entered into for profit and in connection with his business of investor regularly carried on.

39. The contract made by plaintiff with the Christiana Securities Company on August 12, 1925, was a transaction entered into for profit and in connection with his business of investor regularly carried on.

40. The contract made by plaintiff with the Christiana Securities Company on October 28, 1926 was a transaction entered into for profit and in connection with his business of investor regularly carried on.

41. The contract made by plaintiff with the Christiana Securities Company on January 21, 1929, was a transaction entered into for profit and in connection with his business of investor regularly carried on.

42. The contract made by plaintiff with the Delaware Realty & Investment Company on October 25, 1929 was a transaction entered into for profit and in connection with his business of investor regularly carried on.

43. The payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company as hereinbefore shown were ordinary and necessary expenses of his business of investor.

44. The payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company as hereinbefore shown were payments required to be made as a condition to the continued use, for purposes of his business, of property in which plaintiff had no equity.

45. The payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company as hereinbefore shown were for interest upon his indebtedness to that company.

46. The payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company as hereinbefore shown were losses sustained during the taxable year in his business.

47. The payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company as hereinbefore shown were losses incurred during the taxable year in a transaction entered into for profit.

PLAINTIFF'S REQUEST FOR CONCLUSIONS OF LAW

1. Plaintiff was entitled under section 23 of the Revenue Act of 1928 to deduct from his gross income, in computing net income for 1931, the sums of \$567,648 and \$80,063.56 paid by him to the Delaware Realty & Investment Company during that year.

2. Plaintiff is entitled to judgment against defendant in the sum of \$172,351.64, with interest from September 24, 1935, according to law.

Respectfully submitted,

RICHARDS, LAYTON & FINGER,
AARON FINGER,

Attorneys for Plaintiff.

IVINS, PHILLIPS, GRAVES & BARKER,
JAMES S. Y. IVINS,
LAURENCE GRAVES,
Of Counsel.

And thereafter, on May 5, 1937, the defendant requested the Court to make the following findings of fact and conclusions of law, viz.:

DEFENDANT'S REQUEST FOR FINDINGS OF FACT.

Defendant's requests for findings numbered 1 to 10 inclusive, 12, 14, 15, 19, 20, 21, 23, 24, 26, 27, 28, 29, 32, 33, 34 and 35, omitted by consent as they are identical with the similarly numbered findings of the District Court hereinafter printed.

Defendant's request for finding of fact numbered 11 is omitted by consent as it is identical with the District Court finding numbered 11 except that the last sentence in the Court's finding was not included in the request.

Defendant's request for finding of fact numbered 13 omitted by consent as being substantially identical with the similarly-numbered finding of the District Court hereinafter printed.

16. On December 31, 1919, there were six stockholders of record who owned 9000 shares or more of the du Pont Company common stock. Of these six, two were trustees holding a total of 24,000 shares, under trusts created by the plaintiff, and being the trusts mentioned in the next succeeding paragraph of these findings. On December 31, 1919, Alfred I. du Pont owned or controlled 75,549 shares, or about 13 per cent., of the outstanding common stock of the du Pont Company. William du Pont owned 28,000 shares, or about 4½ per cent., of the outstanding common stock of the du Pont Company.

NOTE.—This finding is identical with plaintiff's sixteenth request so far as that request goes. There is added to it an identification of the trusts referred to and also a statement of the holdings of Alfred I. du Pont and William du Pont. As to these holdings, see Exhibit 16½, together with explanation of the holdings of the Nemours Investment Corporation at page 102.

17. In order to insure good management of the affairs of the du Pont Company by enlisting permanently the service of able men, to encourage the executive committeemen in future effort to benefit themselves and other stockholders, and in recognition of the good work done by the executive committeemen for the company, the plaintiff, at the instance of the du Pont Company and without any intention of making a profit from the transaction, offered to sell 1000 shares of the common stock of the du Pont Company to each member of the executive committee of the du Pont Company. He did not have available 9000 shares of such stock for delivery. He had available only 74 shares. He had a reversionary interest in two trusts which he had created which held 24,000 shares of such stock, which he expected to be returned to him within the next few years. He was then the owner of 29,125 shares of the common stock of Christiana Securities Company out of a total authorized, issued, and outstanding capital stock of 75,000 shares. The Christiana Securities Company was then the owner of 183,000 shares of the common stock of the du Pont Company out of a total 588,542 shares then issued and outstanding. This direct and indirect ownership made the plaintiff the beneficial owner of more than a 16 per cent. interest in the du Pont Company, an interest greater than that of any other single individual.

NOTE.—This finding omits the first five lines of the plaintiff's seventeenth request and substitutes therefor a statement which is a restatement of the plaintiff's reasons for entering into this transaction as stated by him in his letter of April 1, 1921, to the committeemen—Exhibit R attached to the stipulation. See also Tr. 96, 103. The plaintiff's statement of the reason why the plaintiff entered into this transaction refers to Exhibits D and F attached to the stipulation. These exhibits, so far as the defendant's counsel can discover, do not support in any way the statement made. It is probable that the references are intended to be to Exhibits C and E, for in these exhibits the statements copied into the finding are made, but it is to be noted that these are statements made not by the plaintiff, but in one instance by the secretary of the Christiana Securities Company, Mr. Raskob, and in the other instance are a quotation.

18. Pursuant to a resolution of its Board of Directors, copies of which resolution together with the report therein referred to are marked Exhibits C and E and are attached to this finding as a part hereof, Christiana Securities Company and the plaintiff entered into a written agreement on December 23, 1919, a copy of which agreement marked Exhibit D is attached to this finding and made a part hereof. The plaintiff delivered the 3800 shares of stock of the Christiana Securities Company as required by the aforesaid agreement.

NOTE.—This finding is similar to the plaintiff's eighteenth request. It differs in that instead of setting out a construction of the instruments referred to, the instruments themselves are set out. The plaintiff's construction as set out in this finding is incomplete and omits material parts of the report, resolution, and agreement referred to.

22. The price of \$320 per share was arrived at as the result of a computation prepared by the treasurer of the du Pont Company which was intended to show the net asset value of the stock. The plaintiff at the time considered \$320 per share to be a fair price.

NOTE.—This finding is the same as plaintiff's request No. 22 except that the last sentence has been changed so as to conform to the record. Tr. 96.

Defendant's request for finding of fact numbered 25 substantially identical with similarly numbered finding of the District Court hereinafter printed.

30. The agreement of December 23, 1919, between the plaintiff and Christiana Securities Company was not renewed. It ended and the new agreement was formed through the Delaware Realty & Investment Company. This new agreement was a continuation of the original contract.

NOTE.—This finding is similar to plaintiff's request No. 30, which has been changed so as to conform to the evidence. See Tr. 102 and Exhibit S.

Defendant's Request for Findings

31. On October 25, 1929, plaintiff entered into a written agreement with the Delaware Realty & Investment Company, a corporation in which he was not a stockholder, a copy of which is Exhibit S which is made a part of these findings. The 142,212 shares of the du Pont Company stock were received by the plaintiff and were delivered by him to the Christiana Securities Company in discharge of his obligation under the contract described in findings 16 and 24 to 27, above.

NOTE.—This request is similar to plaintiff's request No. 31. It substitutes for the plaintiff's construction of the agreement in question the agreement itself. Plaintiff's construction omits material parts of the agreement.

36. The plaintiff in 1919 and 1929 had large and diversified investments in stocks and securities. His gross income as shown by his Federal income tax return for the year 1931 was:

Salaries, wages and commissions.....	\$20,640.78
Interest on bank deposits, notes, corporation bonds, etc.	336,748.05
Rents and royalties	4,876.00
Dividends on stock of domestic corporations	1,475,046.54
	<hr/>
	1,837,311.37

The plaintiff in December 1919, was, and since that time has continued to be, the chairman of the board of the du Pont Company (Tr. 93) and a member of its finance committee (Tr. 110). At that time the plaintiff was a stockholder and a director of the General Motors Corporation, the Chatham & Phoenix Bank, the Philadelphia National Bank, the Bankers Trust Company (Tr. 88) and other corporations (Tr. 109). Almost every day some question concerning his personal business came before him and he devoted more or less 50 per cent. of his time to his investments (Tr. 85-A), which consisted in a large part of du Pont Company

stock, although he had other investments in securities of different corporations (Tr. 88). He changed his investments from time to time (Tr. 88) but he was not a speculator or trader (Tr. 88) and had practically no investments in brokerage accounts (Tr. 88, 91). By the year 1929 he had parted with a large part of his du Pont Company stock but was still a large owner of Christiana stock. However, his largest holdings were in General Motors Corporation (Tr. 92). He is unable to state what portion of his time he devoted to the concerns of the General Motors Corporation or to the concerns of the du Pont Company, but his connection with the General Motors Corporation was for the purpose of promoting the interest of the du Pont Company, which was a large stockholder in General Motors (Tr. 112, 113). In 1919 the plaintiff maintained an office in Wilmington, Delaware, for the conduct of his business affairs. He had seven or eight employees in his office at that time. In 1920 he also maintained an office in New York for the conduct of his business. He has maintained both such offices ever since such years. The expense of maintaining such offices was \$36,310.67 in 1931. In 1931 plaintiff sold 63,346 shares of stock in various corporations in which he was a stockholder.

NOTE.—This request compares with plaintiff's request No. 36. The chief difference between this request and the plaintiff's is that this request omits the statement that Mr. du Pont's direct and indirect beneficial ownership in the du Pont Company in 1919 rendered him the largest individual beneficial owner in the du Pont Company. This statement is omitted because when the testimony to this effect was offered by the plaintiff it was objected to by defendant's counsel and rejected (Tr. 97 et seq.). The second difference between the requests is that in lieu of the two and one-half line description of Mr. du Pont's business activities found in the plaintiff's request, a more elaborate statement is found in the defendant's request.

37. The plaintiff in this case was called as a witness but did not state the reasons which induced him to make

the contracts with the Christiana Securities Company and with the Delaware Realty & Investment Company.

38. The plaintiff entered into the contracts with the Christiana Securities Company primarily for the purpose of promoting the business interests of the du Pont Company and if there was any purpose on the part of the plaintiff to protect or enhance the value of his investments in the stock of the du Pont Company, such purpose was only incidental and was not the motive which induced the making of the said contracts.

39. The payments made by the plaintiff to the Delaware Realty & Investment Company in the year 1931 were not ordinary or necessary expenses which the plaintiff incurred in carrying on his business of conserving, protecting, or managing his investments.

40. The payments made by the plaintiff to the Delaware Realty & Investment Company in the year 1931 were not directly connected with and did not approximately result from any trade or business carried on by the plaintiff.

41. The contract with the Christiana Securities Company was not made with the intention or for the purpose of realizing any profit from such contract on the part of the plaintiff.

42. The sales to the executive committeemen were not made by the plaintiff for the purpose of or with the intention or hope of realizing any gain or profit from such sales.

43. The contract with the Delaware Realty & Investment Company was a continuation or extension of the transaction originally entered into with the Christiana Securities Company and the executive committeemen, and was entered into for the sole purpose of holding open and continuing the original transaction.

**DEFENDANT'S REQUEST FOR CONCLUSIONS OF
LAW.**

Defendant's request for conclusion of law numbered 1 omitted by consent as it is substantially identical with the District Court's conclusion numbered 1 hereinafter printed.

Defendant's request for conclusion of law numbered 2 is omitted by consent as it is identical with the District Court's conclusion similarly numbered and hereinafter printed.

Respectfully submitted,

J. J. MORRIS, JR.,
United States Attorney,
MASON B. LEMING,
E. J. DOWD,
T. H. LEWIS, JR.,
*Special Attorneys, Bureau of
Internal Revenue.*

JAMES W. MORRIS,
*Assistant Attorney General,
Department of Justice.*

ANDREW D. SHARPE,
LESTER L. GIBSON,

*Special Assistants to the Attorney General,
Department of Justice.*

And thereafter, on the 21st day of February, 1938, the Court filed the following findings of fact and conclusions of law and opinion in said case, viz.:

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION.

(Filed February 21, 1938.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

PIERRE S. DU PONT,

Plaintiff,

v.

WILLARD F. DEPUTY, Collector of
Internal Revenue for the Dis-
trict of Delaware,

Defendant.

No. 2.

September Term, A. D.
1936.

Summons Case.

FINDINGS OF FACT.*

1. The plaintiff is, and at the time this action was instituted was, a resident of Wilmington, Delaware.

2. On March 15, 1932, the plaintiff filed his Federal income tax return for the calendar year 1931 with the defendant, the United States Collector of Internal Revenue for the District of Delaware.

3. In or about the month of September, 1935, the Commissioner of Internal Revenue of the United States determined a deficiency in income tax against the plaintiff for the calendar year 1931 in the amount of \$142,466.79, whereupon the plaintiff filed a waiver of his right to appeal to the United States Board of Tax Appeals and consented to the

*The exhibits incorporated in these findings by reference are reproduced ante; those indicated by letters are exhibits to stipulation No. 2 and those indicated by numbers are exhibits introduced at the trial.

immediate assessment of the deficiency, expressly reserving, however, the right to prosecute a claim for the refund thereof; the Commissioner then assessed said deficiency together with interest thereon in the amount of \$29,884.85, all of which the plaintiff paid to the defendant on September 24, 1935, in a total sum of \$172,351.64.

4. On March 2, 1936, plaintiff filed with the defendant a claim for the refund of the \$172,351.64 paid to the defendant on September 24, 1935.

5. The plaintiff became connected with the E. I. du Pont de Nemours & Company (hereinafter referred to as the du Pont Company) in 1890. He was treasurer of that company from 1902 until about the time he became president in 1915. He retired as president in 1919 and thereupon became chairman of the board of directors, which office he still holds.

6. Until 1914 the business of the du Pont Company was essentially that of manufacturing explosives, both military and commercial, but largely commercial. After the beginning of the World War in 1914, the military explosive business constituted nearly the entire business. However, during the war period the company was endeavoring to develop other lines of business, such as pyroline, dyes, paint and artificial leather. The business in these products from 1914 to 1919 was small in comparison to the military explosive business, but the company was obtaining experience in forming an organization to carry on these new activities. The military explosive business ceased at the end of the war. The company then hastened to develop and expand its business in the new products which it had developed.

7. The executive committee of the du Pont Company, consisting of nine members, functioned largely as the general manager of the company. After the termination of the war, it was decided that a new group of men should be placed on this committee, and nine new members were ap-

pointed in the spring of 1919. Each of these new members held an important executive position with the company.

8. The du Pont Company had a bonus plan for its employees which had been in operation for a number of years prior to 1919. This plan proved adequate during the war period when the earnings of the company were large. Upon the termination of the war, when faced with unknown earnings and possible heavy losses due to scrapping of plants, it was felt that the bonus plan then employed might be inadequate to get the best out of the men upon whom rested the responsibility of building up a new industry.

9. On June 23, 1919, the plaintiff, as chairman of the Board of the du Pont Company, submitted to the finance committee of the du Pont Company a recommendation which reads:

"I recommend that a committee be appointed to study the question of proper compensation to the members of the new executive committee, with the request that this committee investigate methods adopted by other corporations toward the securing and retaining of men in similar valuable positions. The salaries now being paid by the du Pont Company do not seem sufficient to insure best results for any length of time."

10. The policy of the du Pont Company, in which the plaintiff as one of the responsible officers of that company believed, was to pay the men in its organization, who were responsible for the conduct of the company's business, good salaries and, if possible, to have them interested as stockholders in the company.

11. A committee of one was appointed by the finance committee on June 25, 1919, to make this study. Reports were made by this committee from time to time and on August 27, 1919, a committee of three was appointed to make recommendations regarding the compensation to be paid. This committee made various reports of its activities and on November 11, 1919, submitted a report outlining a defi-

nite plan. This plan contemplated three things: (1) annual contracts for the payment of an annual salary of \$30,000, (2) additional compensation equal to 1 per cent. of the annual earnings of the company in excess of 10 per cent. of the net capital invested as shown by the books of the company, such additional compensation to be invested in the stock of the company at current market prices and delivered to the individuals after the close of the year, and (3) the issuance to each of the nine members of the committee of 1000 shares of common stock of the company at \$400 per share, to be held in trust until January 1, 1925, at which time there would be credited to each member on account of this trust the sum of \$150,000, if he was still a member of such committee, or if he occupied a position considered to be of equal importance, and each such member would then acquire the right to purchase such stock for \$250,000 in cash. This plan was considered by the finance committee, and certain changes suggested. Drafts of contract were prepared and submitted to counsel for the company, who on December 8, 1919, objected to the plan in so far as it involved the issuance of stock by the company. He pointed out that under the Delaware law, under which the du Pont Company was organized, a corporation could issue stock only for money paid, labor performed, or real or personal property acquired, and further that if the stock were to be issued for cash, it must first be offered for subscription to existing stockholders pro rata. This plan to be carried out in the terms indicated, thereupon was abandoned.

12. The du Pont Company did not have available for sale to the members of the executive committee 9000 shares of its stock, other than unissued stock. Such stock was not then listed on any exchange. It was not listed on the New York Stock Exchange until May, 1921. It was bought and sold in small lots by a Wilmington broker. The total number of shares purchased and sold by this broker for the following months were:

Month	Shares Purchased	Shares Sold
December, 1919	209	261
January, 1920	61	59
February, 1920	29	16

13. The total number of shares of du Pont Company stock transferred upon the books of the company, other than transfers by an individual to a personal holding company, or by a trustee to the beneficiary thereof, and after eliminating the 9000 shares transferred (as hereinafter shown) to the members of the executive committee, for the following periods were as follows:

Sept. 22, 1919—Oct. 25, 1919	727 shares
Oct. 28, 1919—Nov. 21, 1919	745 shares
Nov. 22, 1919—Dec. 26, 1919	588 shares
Dec. 26, 1919—Jan. 24, 1920	590 shares

14. Sales and purchases of the common stock of the du Pont Company through the Wilmington broker mentioned above, with the quantities and prices, are shown in Exhibit M attached to the stipulation of the parties herein, which exhibit is hereby made a part of these findings.

15. The bid and asked prices for du Pont common stock as quoted in the "Every Evening," a Wilmington daily newspaper, between October 1, 1919, and December 31, 1919, are as shown in Plaintiff's Exhibit 21, which is hereby made a part of these findings.

16. On December 31, 1919, there were six stockholders of record who owned 9000 shares or more of the du Pont Company common stock. Of these six, two were trustees holding a total of 24,000 shares, under trusts created by the plaintiff, and being the trusts mentioned in the next succeeding paragraph of these findings.

17. In order to insure good management of the affairs of the du Pont Company by enlisting permanently the

services of able men, to encourage the executive committee-men in future effort to benefit themselves and other stockholders, and in recognition of the good work done by the executive committee for the company, the plaintiff, at the instance of the du Pont Company offered to sell 1000 shares of the common stock of the du Pont Company to each member of the executive committee of the du Pont Company. The plaintiff did not have the purpose or intention of making a profit by the specific transaction of the sale of the 1000 shares of the common stock of the du Pont Company to each of the committeemen, but he did have the purpose and intention to conserve and enhance the value of his own substantial beneficial stock holdings in the du Pont Company by endeavoring to secure for the du Pont Company a stable and efficient management. He deemed this result would be best accomplished by causing the members of the executive committee to become stockholders in the du Pont Company. He did not have 9000 shares of du Pont Company stock available for delivery. He had available only seventy-four shares. He had a reversionary interest in two trusts which he had created which held 24,000 shares of such stock, which he had expected to be returned to him within the next few years. He was the owner of 29,125 shares of the common stock of Christiana Securities Company out of a total authorized, issued and outstanding capital stock of 75,000 shares. The Christiana Securities Company was then the owner of 183,000 shares of the common stock of the du Pont Company out of a total 588,542 shares then issued and outstanding. This direct and indirect ownership made the plaintiff the beneficial owner of more than a 16 per cent. interest in the du Pont Company, an interest greater than that of any other single individual.

18. Pursuant to a resolution of its board of directors, copies of which resolution together with the report therein referred to are marked Exhibits C and E and are attached to this finding as a part hereof, Christiana Securities Company and the plaintiff entered into a written agreement on

December 23, 1919, a copy of which agreement marked Exhibit D is attached to this finding and made a part hereof. The plaintiff delivered the 3800 shares of stock of the Christiana Securities Company as required by the agreement.

The agreement referred to was not entered into by the plaintiff with the Christiana Company with the intention or purpose of making a profit thereby.

The market for du Pont Company stock at this time was thin. Nine thousand shares of common stock of the du Pont Company could not have been purchased in the open market without substantially raising the price per share.

19. On December 22, 1919, Irene du Pont, president of the du Pont Company, addressed a communication to the finance committee in which he stated that the plaintiff had offered to sell 1000 shares of du Pont common stock to each of the members of the executive committee, that each of the members desired to accept the offer, that it was greatly desirable to have such men interested as partners in the business, and that it would be difficult for most of them to finance the purchase. He recommended that the finance committee authorize the treasurer to loan each member of the executive committee, for a period of five years, the sum of \$320,000, the purchase price of the stock, and that the company accept as collateral for each such loan 1000 shares of du Pont common stock and the assignment of a life insurance policy for \$150,000, the premium on which would be paid by the company.

20. On December 24, 1919, the finance committee of the du Pont Company held a special meeting and authorized the execution by the company of two contracts with each member of the executive committee. One contract was to provide for (1) the payment of an annual salary of \$30,000, (2) additional compensation of \$150,000 if still in the employ of the company and a member of the executive committee on December 31, 1924, (3) further additional com-

pensation equal to 1 per cent. of annual net earnings of the company over and above 10 per cent. on certain capital employed by the company, and (4) the payment by the company of the premiums on a life insurance policy for \$150,000 for a period of five years. The second contract dealt with the loan of \$320,000 being made to each member of the committee and the obligations of the parties. These contracts were executed.

21. Pursuant to the agreement between the plaintiff and the Christiana Securities Company dated December 23, 1919, a copy of which is annexed to these findings, marked Exhibit D, the plaintiff received from the Christiana Securities Company 9000 shares of common stock of E. I. du Pont de Nemours & Company. Thereafter, in the month of December, 1919, the plaintiff, pursuant to the plan contemplated by the contracts between the du Pont Company and each of the executive committeemen, sold and delivered 1000 shares of the common stock of the E. I. du Pont de Nemours & Company so received by him from the Christiana Securities Company to each of the executive committeemen. All of these sales he made at a price of \$320 per share. The plaintiff received at the time of the sale \$320,000 in cash from each of such committeemen, a total of \$2,880,000.

22. The net asset value of the stock of the du Pont Company was computed by its treasurer at the sum of \$320.94 per share. The price of \$320 per share, referred to in paragraph 21, supra, was considered to be a fair price by all the parties concerned.

23. On March 10, 1921, Irene du Pont, president of the du Pont Company, addressed a communication to the plaintiff, of which a copy is Exhibit Q, which is made a part of these findings.

24. On April 1, 1921, the plaintiff addressed a letter to each of the members of the executive committee reading as follows:

Findings of Fact

"In December 1919 you and others of the Executive Committee purchased from me one thousand (1,000) shares each of the common stock of E. I. duPont de Nemours & Company at \$320 per share. This stock was financed by a loan of \$320,000 made to you by the Company and the stock pledged as collateral. The object of the transaction was:

(1) To recognize the good work done by you for the Company;

(2) To encourage you in further effort to benefit yourself and other stockholders by placing you in a position to share in the profits of the Company;

(3) To continue the plan of insuring good management of the Company's affairs by enlisting permanently the services of able men through securing for them a personal interest in the Company's success apart from salary compensation.

The price charged for the stock was figured at asset value at that time and did not seem unreasonably high in view of the past earnings and future prospects. However, a change has come about in business affairs, so that many good investment opportunities are obtained below asset value. The company needs able men more than it ever did, not only for proper management of affairs but for assistance in restoring values that have declined during the year past. For the stockholders it is all important that you be free of worry over the unexpected outcome of your stock purchase and that your future efforts should result in substantial reward even though values of a year ago are restored and no more.

While no plan of readjustment by E. I. du Pont de Nemours & Company, representing the body of stockholders, has seemed possible, I, as a large stockholder, and, perhaps, the one to be most benefited by the recovery in value of the Company's shares, suggest the following modification of the original transaction:

I will turn over to you 400 shares of the Christiana Securities Company estimated to have a net value of \$400 per share (\$160,000 total), figuring holdings of E. I. du Pont de Nemours & Company stock by Christiana Securities Company at \$156 per share. This

stock is to be held by the Company as additional collateral on the loan made to you, subject to my right to redeem these 400 shares by payment of \$160,000 at the time of maturity of the loan made you by the Company. If I exercise this right, the \$160,000 will be applied to payment of the loan, the balance to be turned over to you. If I fail to exercise the above right, the 400 shares of stock of the Christiana Securities Company will become your property on payment of the loan. In the meantime, dividends declared on the stock of Christiana Securities Company, up to \$8,000 per annum, are to be paid to you. Any dividends above this amount are to be paid to me; but I shall be bound to return to you all dividends received by me if I do not exercise my option to redeem the stock.

One advantage of this plan not to be overlooked in the security to E. I. duPont de Nemours & Company through the holding of this additional collateral.

It would be unfair to close this letter without expressing my appreciation of the good work that has been done by members of the Executive Committee under the very trying experience of recent months and my confidence that their guidance will restore the Company's earning power and, hence, the value of the common stock, as soon as general business conditions permit. One can not overestimate the value of cooperation and confidence. I believe that the success of the Company has been built upon these values, and I hope that succeeding years will only add to their abundance. I feel it an honor to work with you and hope that the offer of this letter will be received favorably as a further binding of ties that need no strengthening."

25. The offer made by the plaintiff, embodied in Finding No. 24, was duly received by the respective addressee, and the proposals therein contained were accepted by the respective committeemen. The shares of Christiana Securities Company stock were delivered in accordance with the terms of the agreements so made.

26. On June 15, 1920, the du Pont Company paid a stock dividend of $2\frac{1}{2}$ per cent. On September 15, 1920, the du Pont Company paid a stock dividend of $2\frac{1}{2}$ per cent.

On each of these dates plaintiff delivered to Christiana Securities Company 225 shares of du Pont common stock, representing the stock dividends on 9000 shares. On December 15, 1920, the du Pont Company paid a stock dividend of 2½ per cent. On December 27, 1920, plaintiff borrowed 450 shares of du Pont common stock from the Christiana Securities Company. On December 15, 1922, the du Pont Company paid a stock dividend of 50 per cent. On January 4, 1923, plaintiff entered into a supplementary contract with the Christiana Securities Company, a copy of which is Exhibit F which is made a part of these findings.

27. On August 10, 1925, the du Pont Company paid a stock dividend of 40 per cent. On August 10, 1925, plaintiff entered into a supplementary contract with the Christiana Securities Company, a copy of which is Exhibit G which is made a part of these findings.

28. On October 28, 1926, the du Pont Company issued two shares of no par common stock in exchange for each outstanding \$100-par share. On October 28, 1926, plaintiff entered into a supplementary contract with the Christiana Securities Company, a copy of which is Exhibit H which is made a part of these findings.

29. On January 21, 1929, the du Pont Company issued three and one-half shares of \$20 par value common stock in exchange for each outstanding no par share. On January 21, 1929, plaintiff entered into a supplementary contract with the Christiana Securities Company, a copy of which is Exhibit I which is made a part of these findings.

30. The agreement of December 23, 1919, between the plaintiff and Christiana Securities Company, expired by its own terms upon December 23, 1929.

31. On October 25, 1929, plaintiff entered into a written agreement with the Delaware Realty & Investment Company, a corporation in which he was not a stockholder, a copy of which is Exhibit S which is made a part of these

findings. The agreement referred to was not entered into by the plaintiff with the Delaware Realty & Investment Company with the intention or purpose of making a profit thereby.

The 142,212 shares of the du Pont Company stock were received by the plaintiff and were delivered by him to the Christiana Securities Company in discharge of his obligation under the contract described in Findings 16 and 24 to 27, above.

32. During the year 1929 the plaintiff returned 300 shares of the common stock of E. I. du Pont de Nemours & Company to the Delaware Realty & Investment Company, thus reducing his obligation to that company to 141,912 shares. During the year 1931 the E. I. du Pont de Nemours & Company paid dividends on its common stock amounting to \$4 per share and in accordance with the agreement with the Delaware Realty & Investment Company dated October 25, 1929, the plaintiff paid to the said company a sum of \$567,648, which was an amount equal to the dividends declared and paid upon the stock borrowed under said agreement and not returned.

33. During the calendar year 1931 the plaintiff paid to the Delaware Realty & Investment Company, in accordance with the terms of his agreement with said company dated October 25, 1929, the amount of \$80,063.56, being an amount equal to federal income taxes asserted against and paid by the Delaware Realty & Investment Company for the calendar year 1930 on account of the receipt by the Delaware Realty & Investment Company from the plaintiff in that year of payments made by the plaintiff under said agreement of October 25, 1929.

34. On his Federal income tax return for the calendar year 1931 the plaintiff claimed and took as a deduction from gross income on line 13, under the heading "Interest Paid," the sum of \$567,648, being the sum mentioned in paragraph 32 above. The plaintiff did not claim or take as a deduction

from gross income on his return the sum of \$80,063.56 mentioned in finding 33 above. The Commissioner of Internal Revenue in determining the tax liability of the plaintiff for the calendar year 1931 and in assessing and collecting the deficiency in tax of \$142,466.79 and interest thereon of \$29,884.85, refused to allow as deductions the above-mentioned amounts of \$567,648 and \$80,063.56, a total of \$647,711.56, paid by the plaintiff to the Delaware Realty & Investment Company.

35. The plaintiff made his return and kept his books for the calendar year 1931 on a cash receipts and disbursements basis.

36. The plaintiff had in 1919, 1920 and 1931, large and diversified investments in stocks and securities. His gross income, as shown by his Federal income tax return for the year 1931 was:

Salaries, wages and commissions	\$20,640.78
Interest on bank deposits, notes, corporation bonds, etc.	336,748.05
Rents and royalties	4,876.00
Dividends on stock of domestic corporations	1,475,046.54
	<hr/>
	\$1,837,311.37

The plaintiff in December 1919, was, and since that time has continued to be, the chairman of the Board of the du Pont Company and a member of its finance committee. At that time, viz.: December, 1919, the plaintiff was a stockholder and a director of the General Motors Corporation, Chatham & Phoenix Bank, Philadelphia National Bank, Bankers Trust Company and other corporations. In 1919 he devoted more or less 50 per cent. of his time to his investments, which consisted in a large part of du Pont Company stock, although he had other investments in securities of different corporations. He changed his investments from time to time by the sale and purchase of securities but he

was not a speculator and had practically no investments in brokerage accounts. By the year 1929 he had parted with a large part of his du Pont Company stock but he retained a large ownership in the stock of the Christiana Company. In 1929, his largest holdings were in General Motors Corporation. He is unable to state what portion of his time he devoted to the concerns of the General Motors Corporation or to the concerns of the du Pont Company, but his connection with the General Motors Corporation, beginning in 1921 and continuing until some time in 1924, was for the purpose of promoting the interest of the du Pont Company, which was a large stockholder in General Motors. In 1919 the plaintiff maintained an office in Wilmington, Delaware, for the conduct of his business affairs. He had seven or eight employees in his office at that time. In 1920 he established an additional office in New York for the conduct of his business. He has maintained both such offices ever since such years. The expense of maintaining such offices was \$36,310.67 in 1931. In 1931 plaintiff sold 63,346 shares of stock in various corporations in which he was a stockholder.

37. The plaintiff's business was primarily that of conserving and enhancing his estate.

He embarked upon his whole course of conduct with the primary intention and purpose and to the end that his beneficial stock ownership in the du Pont Company might be conserved and enhanced.

He did not enter into the respective individual agreements and transactions, heretofore referred to, with the nine committeemen, with the Christiana Company or with the Delaware Realty & Investment Company, with the purpose or intention, or to the end, that he might profit by any of these respective individual transactions.

CONCLUSIONS OF LAW.

1. I find that the plaintiff is not entitled to deduct from his gross income for the year 1931 either the sum of \$567,648 or the sum of \$80,063, paid by him to the Delaware Realty

& Investment Company during that year for the purpose of computing his taxable net income.

2. The plaintiff is entitled to judgment against the defendant in the sum of \$54,439.52, with interest, as stipulated by the parties.

OPINION.

Biggs, Circuit Judge

The plaintiff, Pierre S. duPont, has sued Willard F. Deputy, Collector of Internal Revenue for the District of Delaware, pursuant to the provisions of Section 3226 of the Revised Statutes, June 6, 1932, c. 209, Sec. 1103(a), 47 Stat. 286 (26 U. S. C. A. 1672, 1673) to recover income taxes assessed against the plaintiff for the year 1931, in the amount of \$142,466.79, together with interest thereon in the amount of \$29,884.85, comprising a total of \$172,351.64.

At the time of the trial a stipulation, duly entered into by the parties, was filed with this court, whereby it was agreed by the defendant that the plaintiff was entitled to a judgment of \$54,439.52 upon one of the issues involved herein and would be entitled to a judgment in the sum of \$172,351.64 if he was held to be successful upon the questions presented by the remaining issue.

That issue can be stated broadly as follows. Is the plaintiff entitled to certain deductions claimed by him in computing his net income for the taxable year in question, viz: 1931? To understand the question presented it is necessary to give a brief statement of the facts involved.

Following the end of the World War, the plaintiff, as an individual the largest beneficial owner¹ of the stock of the E. I. duPont de Nemours & Company, aware that the company would be compelled by changing circumstances to engage in business other than the manufacture of explosives, felt, as did other responsible heads of the company,

¹ An individual as distinguished from a corporate holding. The Christiana Securities Company had the largest single holding of the duPont Company stock.

that a new management should be put in charge of its peace-time affairs. As a result, a new executive committee, comprising nine members, was created. The responsible officers of the du Pont Company, including the plaintiff, felt it to be essential that these nine men should be compensated not only by way of salaries and bonuses, but also that each of them should have that interest in the future success of the company best achieved by stock ownership. It was first proposed that the nine executives should receive each 1000 shares of the stock of the company as compensation for future services but since the law of Delaware forbade such a course, another plan was worked out, as follows. After discussion and the agreement of all concerned, the plaintiff undertook to sell to the nine committeemen each 1000 shares of the common stock of the du Pont Company, at an agreed price just under book value, viz: at a price of \$320 per share.² It should be noted that the transaction referred to occurred before the listing of the stock of the du Pont Company under the New York Stock Exchange. Testimony was given at the trial of this cause indicating that the market for the common stock of the du Pont Company was very thin and the purchase of the 9000 shares would have augmented substantially the price per share. The du Pont Company loaned to each of the committeemen the necessary funds to purchase his aliquot portion of the stock and the plaintiff received the purchase price stipulated by him. In short, the plaintiff sold 9000 shares of the common stock of the du Pont Company to the nine committeemen at a price of \$320 a share and received the proceeds therefrom.

The sale just described was a short sale, for at this time the plaintiff was not the legal owner of sufficient stock to consummate the transaction. He was, however, the president and a director of Christiana Securities Company and the holder of a very substantial block of the stock of that company. Pursuant to a contract entered into between the plaintiff and the Christiana Company upon December 23,

² The book value was shown to be \$320.94 a share.

1919, this company loaned to the plaintiff 9000 shares of the common stock of the du Pont Company, which were in fact the shares sold by him to the members of the executive committee. By the agreement just referred to the Christiana Company required that the 9000 shares of stock so loaned by it to the plaintiff should be paid back to it in kind within ten years and, further, that the plaintiff pay to the Christiana Company sums equivalent to all dividends which might be paid by the du Pont Company upon the 9000 shares of stock so loaned until the loan was repaid. It should be here noted that the directors of the Christiana Company in the resolution authorizing the loan of the stock to the plaintiff recited that Christiana Securities Company was the principal stockholder of the du Pont Company and as such was deeply interested in the success of that company. The contract of December 23, 1919, was modified subsequently to the extent that the plaintiff was required to reimburse and did in fact reimburse the Christiana Company for Federal income taxes imposed upon that company by reason of the receipt of the dividends upon the 9000 shares of stock paid to it by the plaintiff in accordance with the contract.*

By March 9, 1921, the stock of the du Pont Company had declined largely in value. The bargain made by the nine committeemen had become a disadvantageous one and was the subject of considerable discussion. In a memorandum from Irene du Pont to the plaintiff, written about March 10, 1921, the following appears: "From the Committeemen's point of view, each has made a bad bargain. From the Company's point of view, the bargain was a bad one, because certainly a majority of the Committeemen are more or less disturbed over their financial condition . . .". The plaintiff thereupon, by letters written by him to each of the committeemen, made plain that he had no intention of making any profit upon the sale of the 9000 shares of du

* Though there were other modifications from time to time as required by the declaration of stock dividends by the duPont Company, these modifications are not pertinent to the legal questions involved.

Pont Company stock to them and proposed to assign to each of the committeemen 400 shares of stock of the Christiana Company, possessing value of \$160,000, but with an option reserved in the plaintiff to enable him to redeem these shares by payment of the sum of \$160,000 to the committeemen at the time of the maturity of the loans made to them by the du Pont Company and heretofore referred to. This offer was accepted by the committeemen and the stock of the Christiana Company was assigned to them by the plaintiff in accordance with the terms of the letters.

As the ten year period, dating from December 23, 1919, drew to a close, the plaintiff, upon October 25, 1929, entered into an agreement with Delaware Realty and Investment Company whereby that company undertook to loan to the plaintiff the necessary shares of du Pont common required by him to repay his loan of stock to the Christiana Company. It should be here noted that the contract of October 25, 1929, between the plaintiff and the Delaware Company, recited that the plaintiff was not "at this time contemplating the closing of the short sale transaction of December, 1919 . . .".

The terms of the plaintiff's contract with the Delaware Company provided that he would return the du Pont Company stock borrowed from it in kind within ten years after October 25, 1929, would pay to it an amount equivalent to all dividends declared by the du Pont Company upon the shares borrowed, and would reimburse the Delaware Company for all taxes paid by it by reason of the receipt by it from the plaintiff of the sums equivalent to the dividends declared upon the stock borrowed. In 1931, the taxable year in question, the plaintiff paid to the Delaware Company the sum of \$567,648, being the amount equivalent to the dividends paid by the du Pont Company upon the shares for which he was then indebted.⁴ In addition thereto the plain-

⁴ i. e., 141,912 shares, the plaintiff having returned 300 shares in 1929. It should be borne in mind that shares of the common stock of the du Pont Company had been augmented from time to time by stock dividends until the original 9000 shares reached a total of 142,212 shares.

tiff paid to the Delaware Company the sum of \$80,063.56, which was in fact the amount of Federal income tax imposed upon the Delaware Company by reason of the payments equivalent to the sum of declared dividends which it had received from the plaintiff. The total of these two items, \$647,711.56, is the amount of the deduction to which the plaintiff claims he is entitled in the suit at bar. Whether the plaintiff is or is not entitled to such deduction is the precise issue here presented.

The facts in the case at bar have been largely stipulated and no pertinent facts, other than what may be described as the intent or purpose of the plaintiff in embarking upon the course of conduct and the transactions here involved, are in controversy.

THE QUESTIONS OF LAW PRESENTED.

The plaintiff makes five contentions. They may be summed up as follows: The sums claimed by way of deduction are deductible because they were (1) ordinary and necessary business expenses; (2) losses sustained during the taxable year, 1931, incurred in the plaintiff's business; (3) payments required to be made by the plaintiff as a condition to the continued use of property in which the plaintiff had no equity; (4) interest on the indebtedness of the plaintiff; or, (5) if not losses sustained in the plaintiff's business, were losses in a transaction entered into by the plaintiff for profit. If any one of these five contentions is deemed to be valid by the court, the plaintiff must prevail.

The pertinent statutory provisions are contained in Section 23 of the Revenue Act of 1929, and are set out hereafter:

"SEC. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions:

"(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for

personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

“(b) Interest.—All interest paid or accrued within the taxable year or indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title.”

“(e) Losses by individuals.—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck or other casualty, or from theft.”

(1) and (2) A. *Were the Amounts Paid by the Plaintiff Ordinary and Necessary Expenses, or Losses Incurred in the Plaintiff's Business within the Taxable Year?*

Since the questions presented under this heading are largely analogous, it seems appropriate to discuss the cases relating to both grounds as if they were in a single category, pointing out, however, the pertinent distinctions that occur in each case in relation to the case at bar. For the plaintiff to avail himself of the deduction upon either ground herein suggested by him, the sums paid by him must be held to be ordinary and necessary expenses paid or incurred in carrying out the plaintiff's trade or business, or

losses incurred in his trade or business, falling respectively within the provisions of subsection (a) or subsection (e)(1) of Section 23 of the Revenue Act of 1928.

It is conceded that the plaintiff was not a dealer or trader in securities and that he was not one who devoted his time to buying and selling securities through brokers as a matter of speculation. He contends, however, that he ". . . was engaged in the business of managing, protecting and conserving his investments, involving many millions of dollars". The record establishes the facts that the plaintiff had the largest beneficial interest of any single individual in the du Pont Company, was chairman of its board, was a stockholder in General Motors Corporation, in which the du Pont Company was also a stockholder, was a director of General Motors Corporation and had other varied and substantial interests. It is contended by the plaintiff that the word "business", as used throughout the statute as quoted, will embrace the plaintiff's activities and that the expenditures of the sum of \$647,711.56, claimed as a deduction from the plaintiff's gross income, was an essential part of the plaintiff's business activity.

The plaintiff's position may be summed up succinctly by the following statement appearing upon his brief: "He (the plaintiff) believed that it was good business and that he would profit by the sale of stock to members of the executive committee. He felt that he was making them partners in the business (of the du Pont Company) and that because of his large interest in the company he would be naturally benefited." While the plaintiff himself testified only that he believed in the policy of paying the men who were responsible for the conduct of the du Pont Company's affairs good salaries and, if possible, giving them an interest in the company as stockholders, none the less we believe that the statement from the plaintiff's brief, quoted above, sets out his position and that this conclusion is a fair inference to be drawn from the record as a whole. In this connection it should be noted that the plaintiff stated

to Walter S. Carpenter, one of the committeemen, by his letter of April 1, 1921,⁵ that it was his purpose to recognize the work done by the committeemen for their company and to encourage them in further efforts to benefit themselves and the other stockholders by placing them in a position to share in corporate profits. In short, the plaintiff felt that by benefiting the members of the executive committee he would benefit the corporation and himself as a stockholder of the corporation. Other motives may have actuated the plaintiff's course of conduct. As former president of the du Pont Company, and as chairman of its board of directors, he had contributed substantially to the success of the company in the past. He doubtless, therefore, had a sentimental interest in its future welfare, but I think it is true and I find it to be a fact that the governing motive, intent and purpose behind the plaintiff's whole course of conduct was to enhance the value of his financial interest in the du Pont Company.

Now if the plaintiff is to recover upon either of the theories here referred to, he must bring his expenditures within the definition of ordinary and necessary expenses resulting from, or losses incurred in his business. The word "business" has been defined by the Supreme Court in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 171, in such a way as to embrace nearly any activity; more narrowly in *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 515, wherein it was stated that a decision of this question must turn upon the particular facts of each case.

In *Dart v. Commissioner*, 74 F. (2nd) 845, dividends charged by brokers to the "short" accounts of taxpayers

⁵ In this letter the plaintiff stated in part: "While no plan of readjustment by E. I. du Pont de Nemours & Company, representing the body of stockholders, has seemed possible, I, as a large stockholder, and, perhaps, the one to be most benefited by the recovery in value of the Company's shares, suggest the following modification of the original transaction:—" There follows the details of the terms of the donation of the Christiana Company stock to the committeemen by the plaintiff.

engaged in speculating in stocks were held to be deductible as ordinary and necessary expenses pursuant to the provisions of Section 23 (a) of the Revenue Act of 1928 and therefore not chargeable as capital expenditures. It should be noted that here the charges which were allowed as deductions grew directly out of the speculations of the claimants and that the court held in effect that speculation in securities, or the buying and selling of securities, was the business of the taxpayers.

In *Kenan v. Bowers*, 48 F. (2nd) 263, the court held, interpreting Section 5 of the Revenue Act of 1916 (39 Stat. 759), that a beneficiary of a trust estate could not deduct from her individual gross income additional compensation paid by her to the trustees because she did not own the property upon which the services were expended and would receive only a negligible part of the fruits of the trustees' labors in respect to that property. This holding is to the effect that the protection of a trust estate is not the business of a cestui que trust and that therefore the payments made by the taxpayer did not stem directly out of the taxpayer's business.

In *Commissioner v. Field*, 42 F. (2nd) 820, 823, it was held that the payment of compensation to attorneys in a suit to determine a taxpayer's rights in an estate fell within those general costs of protecting property for which the statute made no allowance.

In *Foss v. Commissioner*, 75 F. (2nd) 326, it was held that a taxpayer, compelled by reason of his business activities in respect to two certain corporations to expend attorneys' fees to defend himself in a suit brought by the minority stockholders of one such corporation might deduct these fees as ordinary and necessary expenses pursuant to the provisions of Section 214(a)(1) of the Revenue Act of 1918. The court stated, "The line (of demarcation as to deductible and non-deductible expenses) comes between those who take the position of passive investors, doing only what is necessary from an investment point of view, and those who

associate themselves actively in the enterprises in which they are financially interested and devote a substantial part of their time to that work as a matter of business." This is in effect a holding that the extent of the business activity of the taxpayer constitutes the test of deductibility of expenditures. But it should be pointed out that in the cited case expenditures arose directly out of the business activities of the taxpayer.

In *Commissioner v. People's-Pittsburgh Trust Company*, 60 F. (2nd) 187, it was held that money expended by a taxpayer for attorney's fees in the successful defense of a criminal suit based upon an alleged false affidavit made by him as chairman and principal executive head of a steel company were deductible under the provisions of Section 214(a)(1) of the Revenue Act of 1921 (42 Stat. 239) as ordinary and necessary expenses incurred in carrying on a trade or business. In this case the court held that these expenses were directly attributable to the taxpayer's business which was stated to be that of an executive head of a steel company.

The cases cited seem to set forth a common principle, namely, that an expense is deductible by the taxpayer if it arises *directly*, that is to say *proximately* out of the course of business which the taxpayer is regularly carrying on and can fairly be described as an "ordinary and necessary" expense thereof. This principle was clearly enunciated by the Supreme Court in *Kornhauser v. United States*, 276 U. S. 145, 153, wherein a taxpayer, a lawyer, who successfully defended an accounting suit brought by his former partner for an accounting for shares of stock which the taxpayer had received for professional services, was allowed to deduct a fee for the counsel defending the suit. The Supreme Court stated that the correct basis of such holding was ". . . where a suit or action against a taxpayer is directly connected with, or . . . proximately resulted from, his business, the expense incurred is a business expense within the meaning of Section 214(a), subdivision (1) of the act."

Bearing in mind the principle enunciated by the Supreme Court that expenses may be deducted if proximately resulting from or directly connected with a business, I deem it desirable at this point to refer to certain cases dealing with losses attempted to be deducted as incurred in a trade or business.

In *Goldberg v. Commissioner*, 36 F. (2nd) 551, it was held that a loss, sustained by the taxpayer in a business transaction resulting from the purchase and subsequent sale by the taxpayer of a house, was not deductible as a loss occurring in a "regular trade or business" within the provisions of Section 204(a) of the Revenue Act of 1921, (42 Stat. 227, 231). Here, though the taxpayer was president, treasurer and sole stockholder of a corporation which was engaged regularly and constantly in the purchase and sale of real estate, the court held that when the taxpayer made a purchase and sale of real estate on his own account, such was not within the scope of his ordinary business.

In *Rogers v. United States*, 41 F. (2nd) 865, 868, a physician, having invested his earnings in a stock transaction which resulted in a loss, was not allowed to deduct this loss as resulting from "any trade or business regularly carried on" by him within the provisions of Section 204 (a) and (b) of the Revenue Act of 1921 because the court was of the opinion that this loss resulted from an isolated business transaction despite the fact the physician devoted much of his time to conserving and maintaining his estate. The court treated his efforts in this direction as an "avocation".

In *Washburn v. Commissioner*, 51 F. (2nd) 949, it was held that a taxpayer who sold at a loss stock of a corporation which he was managing, could deduct such loss as being incurred in a business regularly carried on by him within the provisions of Section 204 (a) and (b) of the Revenue Act of 1921. The court stated, "We think the line here is not difficult to draw. The business of petitioner was

not merely looking after investments or reaping the return of past labor, represented thereby. He had an office with a complete organization, and gave personal attention to, and participated in, the management of these various companies and enterprises in which he had the investments, not for the purpose of conserving them merely, but of carrying them on successfully and making them profitable. To this he gave his entire time, receiving no salary, except such as might cover his expenses. His work for these different enterprises was not merely sporadic, but was a continuous and regular carrying on." In the cited case the court distinguishes between the business of conserving an investment and enlarging it; in effect stating that he who makes an investment more profitable by devoting most or all of his time to it may avail himself of a deduction, where he who seeks to conserve an investment by sporadic devotion of his time and energy to that end cannot be favored by the statute.

But in my opinion the decision in *Washburn v. Commissioner*, *supra*, has been overruled by the decision of the Supreme Court in *Burnet v. Clark*, 287 U. S. 410, in which a taxpayer who was the majority stockholder and president of a corporation incurred substantial losses by reason of his purchase of its stock and by his endorsement of its notes. He claimed these losses as deductions under Sections 204(a) and (b) of the Revenue Act of 1921. In delivering the opinion of the Supreme Court, Mr. Justice McReynolds said, "The respondent was employed as an officer of the corporation; the business which he conducted for it was not his own. There were other stockholders. And in no sense can the corporation be regarded as his *alter ego*, or agent. He treated it as a separate entity for taxation; made his own personal return and claimed losses through dealings with it. He was not regularly engaged in endorsing notes, or buying or selling corporate securities. The unfortunate endorsements were no part of his ordinary business, but occasional transactions intended to preserve the value of his investment in capital shares."

In *Dalton v. Bowers*, 287 U. S. 404, the taxpayer formed a corporation for the purpose of manufacturing and selling articles patented by him. He purchased all of the capital stock of the corporation and took active charge of its affairs. The business proved unprofitable and from time to time he made loans to the corporation to pay its debts. He attempted to deduct the losses thus occurring to him as "attributable to the operation of a trade or business regularly carried on" by him within the meaning of Section 206(a) and (b) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 260. The Supreme Court held that the trade or business of the corporation was not a trade or business carried on by the taxpayer and the losses so sustained by him were not deductible. Very similar in legal effect is the decision in *Mastin v. Commissioner*, 28 F. (2nd) 748, in which the taxpayer paid for advertising real estate owned by a corporation in which he was a stockholder and sought to deduct the sums thus paid as losses under section 214(a) of the Revenue Acts of 1919 (40 Stat. 1057), and 1921 (42 Stat. 227). The court stated, "The payment was therefore made, not by petitioner to advertise his own real estate, not by the corporation to advertise real estate owned by it, but by petitioner as a voluntary one. It was, in our opinion, a capital expenditure, which might enhance the value of petitioner's stock by increasing the value of the lands of the corporation. It was not a loss within the meaning of the statute under discussion."

See also *Burnet v. Commonwealth Improvement Company*, 287 U. S. 415; *Van Dyke v. Helvering*, 291 U. S. 642; and *McGinn v. Commissioner*, 76 F. (2nd) 680.

In my opinion the sums paid by the plaintiff cannot be deducted by him from his gross income as ordinary and necessary expenses incurred by him in carrying on his trade or business for two reasons:

First, the sums paid by the plaintiff cannot be brought within the principle enunciated by the Supreme Court in *Kornhauser v. United States*, *supra*. The plaintiff made

the payments in question for the same reasons that actuated his entire course of conduct, viz, because he hoped that he might profit through the enhanced value of the stock of the du Pont Company beneficially owned by him. This was his hope, his expectation, and though eminently reasonable and well sustained by subsequent events, none the less it is obvious that there is no proximate causation, or direct connection, between the payment by the plaintiff of the sums to the Delaware Company here sought to be deducted by him and the enhancement of the stock ownership of the plaintiff in the du Pont Company. In fact one might bring the payment of funds by the plaintiff one stage closer to the ultimate result sought by him, without rendering such sums deductible. For example, if the plaintiff, out of his own pocket, had increased the pay of chemists employed by the du Pont Company with the hope that by reason of such increase they would work more effectively to improve the processes of the du Pont Company, perhaps thereby increasing the value of the plaintiff's stock, I conceive that it would not be contended that these payments would be deductible by the plaintiff from his gross income under the theory here advanced by him.

Second, the expenditures here in litigation cannot be deemed to be ordinary and necessary. The course of conduct evoking them was in fact so extraordinary as to occur in the lives of ordinary business men not at all, and in so far as this record shows in the business life of the plaintiff but once. As was said by Mr. Justice Cardozo, in *Welch v. Helvering*, 290 U. S. 111, 114. "There is nothing ordinary in the stimulus evoking it, and none in the response." The payments here in question were beyond the norm of general and accepted business practice. In this sense they must be deemed to be extraordinary.

Can they be treated as losses sustained within the taxable year and incurred by the plaintiff in his business? The transactions of the plaintiff in respect to the du Pont Company's stock were in fact isolated transactions; that is to

say, were distinctly unlike separate and apart from the usual methods pursued by the plaintiff in the business of conserving and enhancing his estate. Losses growing out of such isolated transactions ordinarily are not deductible. *Mente v. Eisner*, 266 F. 161, 162. Aside from this, however, and as indicated heretofore, such losses to be deductible must be directly connected with or proximately resulting from the business of the taxpayer. The facts of the case at bar seem closely analogous to those in *Mastin v. Commissioner*, *supra*, wherein recovery was denied to the taxpayer, the court holding that the expenditures were capital expenditures made by the taxpayer with the hope of enhancing the value of his stock through increasing the asset value of the corporation.

In my opinion the plaintiff cannot be allowed to deduct the sums in question upon either of the grounds here discussed.

B. As to the Narrower Ground Contended for by the Plaintiff: that the Payments by him to the Delaware Company Enabled him to Conserve and Enhance his Estate.

The plaintiff contends however that his position must be sustained upon a much narrowed ground. He states this as follows. By borrowing stock, from the Delaware Company, the plaintiff was not compelled to expend money or securities to cover his short transaction with the Christiana Company; such money or securities remained as part of his estate and conserved and enhanced it. Therefore the sums here sought as deductions, which are in fact the carrying charges paid by the plaintiff to the Delaware Company for the borrowed stock, are necessary and ordinary expenses incurred by him in carrying on his business.

This contention seems to me to be without merit. It will be observed that the argument must rest upon the fundamental proposition that the plaintiff's transaction with the Delaware Company was for profit. It is clear that the original transaction with the Christiana Company was

not-for profit, for in April, 1921, when the short sale might have been profitably covered the plaintiff gave Christiana Company stock, having a value of \$1,440,000, to the nine committeemen, and in effect thereby disavowed any intention of profiting by the short sale.

There is no reason why the plaintiff's dealings with the Delaware Company should be considered as being upon another or different basis. Certainly there is no evidence in the record which serves to indicate that the plaintiff entered into the transaction with the Delaware Company with any different end in view than that which actuated his dealings with the Christiana Company. The contract of October 25, 1929, specifically sets forth that the plaintiff did not contemplate at that time the closing of the short sale transaction. That the transaction with the Christiana Company was closed is a fact, but the phrase referred to tends to indicate that the plaintiff did not consider his dealings with the Delaware Company to be upon any different basis.

At the time of the short sale, it would have been difficult and indeed expensive for the plaintiff to have purchased 9,000 shares of du Pont Company stock in the open market. It was for this reason that the plaintiff borrowed the stock rather than purchased it. To this extent, and to such extent only, his action might have served to enhance his estate, but a finding that he sought to enhance his estate by such a method is incompatible with the facts made manifest by his entire course of dealing with the committeemen. Had he intended to enhance his estate by keeping invested money or securities which otherwise he would have had to pay out, he would not have embarked upon his entire course of conduct which from its beginning until the present time certainly has proven less profitable than covering his short transaction. The plaintiff's course of conduct was not trivial. It was based upon a broader plan.

The plaintiff was not engaging in a course of speculation which might prove profitable if he was able to cover

his short sale at a lesser price upon some future date. The hope of profit is inherent in the ordinary short sale and under *Dart v. Commissioner*,⁶ *supra*, carrying charges were deemed to be deductible. In the case at bar, however, when the short sale by reason of changing circumstances and market conditions gave the possibility of a profit, the plaintiff was quick to disavow such an advantage. Such action was entirely inconsistent and incompatible with his present narrow contention.

The plaintiff's original transaction with the committee-men, and his subsequent donation of the stock of the Christiana Company to them, was deemed by the plaintiff to be a prerequisite for the conservation and enhancement of his stock interest in the du Pont Company, for by these steps he believed that a sound corporate management would be achieved. The end result sought by the plaintiff was profit by way of the enhancement of his stock interest, but he did not seek to profit by the intermediate steps whereby that result was to be achieved.

The plaintiff must also fail upon the narrower grounds which he has here asserted.

3. *As to the Contention that the Payments were Made for the Continued Use of Property in which the Plaintiff was without Equity, within the Meaning of Subsection (a) of Section 23.*

In view of the language of the subsection which requires rentals or payments to be made for the purposes of the trade or business of the taxpayer if they are to be deemed deductible, I am of the opinion that such rentals or payments must also result proximately from or be directly connected with the business of the taxpayer. Since the payments in the case at bar cannot be so described,

⁶ In my opinion *Dart v. Commissioner* can be otherwise distinguished from the case at bar. *Terbell v. Commissioner*, 29 B. T. A. 44, affirmed per curiam, 71 F. (2nd) 1017, can likewise be distinguished.

this contention of the plaintiff must also be disposed of unfavorably to him upon the same grounds as are indicated in the ruling upon points (1) and (2), *supra*. I deem it desirable, none the less, to discuss briefly other contentions raised by the parties under this heading.

The shares of du Pont Company stock borrowed by the plaintiff from the Delaware Company are still owing from the plaintiff to that company and the transaction is still open. These shares were received by the plaintiff pursuant to the terms of the contract of October 25, 1929, and he delivered these shares to the Christiana Company in fulfillment of his obligation.

The plaintiff contends that the 141,912 shares of stock of the du Pont Company which he had borrowed from the Delaware Company were in continued use in his business as an investor, for by continuing his obligation to the Delaware Company unretired he was enabled to keep invested in other income producing securities as much money as it would cost him to discharge his obligation to the Delaware Company. He contends further that since he was required to pay to the Delaware Company, as a condition to such use, sums equivalent to dividends declared and taxes assessed, that therefore the total of these sums was deductible as rentals or other payments required within the terms of the statute.

These contentions are without merit. First, an obligation to pay is not property in so far as the obligor is concerned and cannot be so considered. Second, there was no "continued use or possession" of the stock by the plaintiff within the terms of the statute. He used the stock *once*, in 1929, for the purpose of discharging his obligation to the Christiana Company. He did not use it again. In fact, he could not use it again because he did not have possession of it after 1929. The sums which he now seeks to deduct were in fact paid by him pursuant to his contract with the Delaware Company and were simply part of the conditions under which the stock came into his hands. He had title

to the stock when it was received by him from the Delaware Company and he transferred that title to the Christiansa Company when he discharged his obligation to it. The statute is specific in that it allows as deductions from gross income only "rentals or other payments required to be made as a condition to the continued use or possession . . . , of property to which the plaintiff has not taken or is not taking title or in which he has no equity."

Finally, the plaintiff contends that a fair interpretation of that portion of the statute just quoted requires the final "or" must be considered to have effect as a disjunctive preposition and that therefore the statute should be made to read as if the words were, "Rentals or other payments required to be made as a condition to the continued use of the property in which the taxpayer has no equity." However, he cites no authorities in support of this contention and in my opinion it is contrary to the plain intendment of the statute, which states three conditions which must be fulfilled before the taxpayer is authorized to make the deduction sought. That such is the correct interpretation of the phrase "to which the taxpayer has not taken or is not taking title or in which he had no equity" is plain, because the first "or" in the phrase quoted clearly indicates that deductions for the use or possession of property cannot be made by the taxpayer if he has either taken title or is taking title to the property. In other words the deduction cannot be availed of if the taxpayer has brought himself into either category prohibited by the statute. There is nothing upon the face of the statute which indicates any intention upon the part of Congress to impose a different interpretation in respect to the phrase "in which he has no equity" following the final use of the word "or."

4. *Are the Amounts Paid by the Plaintiff Interest on Indebtedness within the Meaning of Subsection (b) of Section 23?*

The plaintiff contends that the word "interest" means money paid for the forbearance of demanding payment of

a debt and that the word "debt" in turn means that which is due from one person to another, whether money, goods or services. See Webster's New International Dictionary. Applying these definitions to the facts of the case at bar, the plaintiff urges that his obligation to return the shares of stock borrowed from the Delaware Company to it in kind is a debt, and that the sums paid by him, representing the dividends upon the stock and taxes, are interest on the debt, viz; the price of the forbearance by the Delaware Company to collect the stock.

In the case at bar, the plaintiff made a short sale. It is customary upon a short sale of stock for sums, the equivalent of the dividends paid upon the shares borrowed, to be paid by the borrower to the lender of the stock until the short sale is covered. These sums, however, are not commonly referred to as interest, and a search discloses no case in which carrying charges upon a short sale have been treated as such. Interest is defined ordinarily as the compensation allowed by law or fixed by the parties for the use or forbearance of money. *City of Lincoln, Nebraska, v. Ricketts*, 77 F. (2nd) 425, 428; *Redfield v. Yatalyfera Iron Co.*, 110 U. S. 174, 176; *London v. Taxing District of Shelby County*, 104 U. S. 771, 774; *Maryland Casualty Co. v. Omaha Electric Light & Power Co.*, 157 F. 514. In respect to the word "interest" as used in federal taxing acts, the word is accepted as meaning the compensation allowed by law or fixed by parties, for use, or forbearance or detention of money. *Fall River Electric Light Co. v. Commissioner*, 23 B. T. A. 168, 171; *Westerfield v. Rafferty*, 4 F. (2nd) 590, 594; *Appeal of Joseph W. Bettendorf*, 3 B. T. A. 378, 383; *New Orleans Land Co. v. Commissioner*, 29 B. T. A. 35, 38; *Dry Dock Bank v. American Life Insurance and Trust Co.*, 3 N. Y. 344, 355; *Hayes v. Commissioner*, 158 N. E. 539; *Title Guaranty and Surety Co. v. Klein*, 178 F. 689, 691; *Old Colony Railroad Co. v. Commissioner*, 284 U. S. 552.

I therefore conclude that the sums paid by the plaintiff cannot be deemed to be interest on indebtedness within the terms of the statute.

5. *Are the Sums paid Deductible as Incurred in a Transaction Entered into by the Plaintiff for Profit, though not Connected with his Business, Pursuant to the Provisions of Sub-section (e)(2) of Section 23?*

Can it fairly be said that the expenditure by the plaintiff of the sum here sought to be deducted was incurred in a transaction entered into by the plaintiff for profit "though not connected with the trade or business" of the plaintiff? Can the entire course of conduct of the plaintiff from December, 1919, until the end of the taxable year, 1931, be deemed to be a "transaction" within the meaning of the statute referred to? In my opinion the course of the plaintiff properly can be so defined,⁷ but I am also of the opinion that the word "losses" as used by the statute refers not to interim sums required to be paid out by the taxpayer in the course of the transaction, but refers to actual losses suffered by the taxpayer as a result of the transaction. Such losses cannot be computed until a transaction has been completed or reaches a stage where the loss can be calculated. In the case at bar there is no evidence that the course of conduct of the plaintiff, considered as a whole, has resulted in any loss to him. Indeed, upon the contrary, there is some evidence of the enhancement of his estate through the advance in value of the du Pont Company stock beneficially owned by him, but it is impossible, for the reasons set forth in heading (1) and (2), *supra*, to calculate for tax purposes the profit or loss of the plaintiff growing out of his whole course of conduct even when the short transaction be closed. In my opinion the expenditures of the plaintiff, speaking generally, were in the nature of capital expenditures, but they may not be added to the cost of the plaintiff's holding of du Pont Company stock for the reason that these expenditures did not proximately result from and were not directly

⁷ See the Century Dictionary and Cyclopedia, Vol. VIII; Webster's New International Dictionary; Bouvier's Law Dictionary.

connected with the conservation and enhancement of the plaintiff's stock in the du Pont Company.

Recovery must be denied to the plaintiff upon this ground as well.

AS TO THE QUESTION OF DOUBLE TAXATION.

The plaintiff contends that the sum here in question has been subjected to double taxation, having been taxed once as part of the income of the Delaware Company and again as part of the income (since he was not allowed to deduct it) of the plaintiff. The statement that Federal taxes have been assessed twice against the sum which the plaintiff here seeks to deduct is in fact correct. But under our system of income taxation taxes are assessed not against a fund but against the individual or corporation. Further it must be borne in mind that what the plaintiff did here, his entire course of conduct, was in fact most unusual and quite beyond the norm of business practice. No case has been found or cited which presents the precise questions here involved and the facts here involved in all probability could not have been adverted to by The Congress.

Accordingly, judgment will be entered for the plaintiff in the sum of \$54,439.52, with interest as stipulated by the parties. Judgment for the plaintiff in any larger sum will be refused.

Exceptions, if any, may be filed within thirty days.

(Sgd.) JOHN BIGGS, JR.,
Circuit Judge.

And thereafter, on the twenty-second day of March, 1938, the plaintiff filed the following exceptions to the findings of fact and conclusions of law and opinion of the Court, viz.:

**PLAINTIFF'S EXCEPTIONS TO FINDINGS OF FACT,
CONCLUSIONS OF LAW AND OPINION.**

(Filed March 22, 1938.)

Plaintiff respectfully notes the following exceptions to the findings of fact, conclusions of law, and opinion of the Court entered herein on February 21, 1938:

(1) Plaintiff excepts to that portion of finding of fact No. 17, which reads, "The plaintiff did not have the purpose or intention of making a profit by the specific transaction of the sale of the 1000 shares of the common stock of the du Pont Company to each of the committeemen" as being unsupported by any substantial evidence in the record and as contrary to the evidence.

(2) Plaintiff excepts to that portion of finding of fact No. 18, which reads, "The agreement referred to was not entered into by the plaintiff with the Christiana Company with the intention or purpose of making a profit thereby" as being unsupported by any substantial evidence in the record and as contrary to the evidence.

(3) Plaintiff excepts to that portion of finding of fact No. 31, which reads, "The agreement referred to was not entered into by the plaintiff with the Delaware Realty & Investment Company with the intention or purpose of making a profit thereby" as being unsupported by any substantial evidence in the record and as contrary to the evidence.

(4) Plaintiff excepts to that portion of finding of fact No. 37, which reads, "He did not enter into the respective individual agreements and transactions, heretofore referred to, with the nine committeemen, with the Christiana Company or with the Delaware Realty & Investment Company,

with the purpose or intention, or to the end, that he might profit by any of these respective individual transactions" as being unsupported by any substantial evidence in the record and as contrary to the evidence.

(5) Plaintiff excepts to conclusion of law No. 1 as contrary to the evidence and to the law.

(6) Plaintiff excepts to conclusion of law No. 2 as contrary to the evidence and to the law.

(7) Plaintiff excepts to the statement of fact appearing in the opinion (page 18) reading, "The contract of December 23, 1919, was modified subsequently to the extent that the plaintiff was required to reimburse and did in fact reimburse the Christiana Company for Federal income taxes imposed upon that company by reason of the receipt of the dividends upon the 9000 shares of stock paid to it by the plaintiff in accordance with the contract" as being unsupported by any substantial evidence in the record and contrary to the evidence.

(8) Plaintiff excepts to the statement in footnote No. 3 to the opinion (page 18) as an erroneous conclusion of law, the contracts between plaintiff and Christiana Securities Company subsequent to the original contract of December 23, 1919 being highly pertinent and material to the issues of law herein.

(9) Plaintiff excepts to the statement of fact appearing in the opinion (page 19) reading, "The plaintiff thereupon, by letters written by him to each of the committeemen, made plain that he had no intention of making any profit upon the sale of the 9000 shares of du Pont Company stock to them" as being unsupported by any substantial evidence in the record and contrary to the evidence.

(10) Plaintiff excepts to the conclusions in that part of the opinion marked A (pp. 22-31) as being based upon misconstruction of the facts, in conflict with facts found, and erroneous in law.

(11) Plaintiff excepts to the statement in the opinion (page 30) reading, "it is obvious that there is no proximate causation, or direct connection, between the payment of the plaintiff of the sums to the Delaware Company here sought to be deducted by him and the enhancement of the stock ownership of the plaintiff in the du Pont Company" as being unsupported by any substantial evidence in the record and as contrary to the evidence, and erroneous in law.

(12) Plaintiff excepts to the statement in the opinion (page 30) reading, "Second, the expenditures here in litigation cannot be deemed to be ordinary and necessary. The course of conduct evoking them was in fact so extraordinary as to occur in the lives of ordinary business men not at all, and in so far as this record shows in the business life of the plaintiff but once. . . . The payments here in question were beyond the norm of general and accepted business practice. In this sense they must be deemed to be extraordinary" as being unsupported by any substantial evidence in the record and as contrary to the evidence, and erroneous in law.

(13) Plaintiff excepts to the statement in the opinion (page 31) reading, "The transactions of the plaintiff in respect to the du Pont Company's stock were in fact isolated transactions; that is to say, were distinctly unlike, separate and apart from the usual methods pursued by the plaintiff in the business of conserving and enhancing his estate" as being unsupported by any substantial evidence in the record.

(14) Plaintiff excepts to the conclusions in that part of the opinion marked B (pp. 31-33) as being based upon misconstruction of the facts, in conflict with facts found, and erroneous in law.

(15) Plaintiff excepts to the statement in the opinion (page 32) reading, "in April, 1921, when the short sale might have been profitably covered" as being unsupported by any substantial evidence in the record.

(16) Plaintiff excepts to the statement in the opinion (page 32) reading, "and in effect thereby disavowed any intention of profiting by the short sale" as being a wholly unjustifiable conclusion of fact based on no substantial evidence in the record.

(17) Plaintiff excepts to the statements in the opinion (page 32) reading, "Certainly there is no evidence in the record which serves to indicate that the plaintiff entered into the transaction with the Delaware Company with any different end in view than that which actuated his dealings with the Christiana Company. . . . That the transaction with the Christiana Company was closed is a fact, but the phrase referred to tends to indicate that the plaintiff did not consider his dealings with the Delaware Company to be upon any different basis" as being unsupported by any substantial evidence in the record and as contrary to the evidence.

(18) Plaintiff excepts to the statement in the opinion (page 32) reading, "To this extent, and to such extent only, his action might have served to enhance his estate, but a finding that he sought to enhance his estate by such a method is incompatible with the facts made manifest by his entire course of dealing with the committeemen" as being inconsistent with findings of fact made and with other statements of fact contained in the opinion.

(19) Plaintiff excepts to the statement in the opinion (pp. 32-33) reading, "Had he intended to enhance his estate by keeping invested money or securities which otherwise he would have had to pay out, he would not have embarked upon his entire course of conduct which from its beginning until the present time certainly has proven less profitable than covering his short transaction" as being unsupported by any substantial evidence in the record, as contrary to the evidence and as inconsistent with other statements of fact contained in the opinion.

(20) Plaintiff excepts to the statement in the opinion (page 33) reading, "The plaintiff was not engaging in a course of speculation which might prove profitable if he was able to cover his short sale at a lesser price upon some future date" as being unsupported by any substantial evidence in the record and as contrary to the evidence.

(21) Plaintiff excepts to the statement in the opinion (page 33) reading, "In the case at bar, however, when the short sale by reason of changing circumstances and market conditions gave the possibility of a profit, the plaintiff was quick to disavow such an advantage" as being unsupported by any substantial evidence in the record and as contrary to the evidence.

(22) Plaintiff excepts to the statement in the opinion (page 33) reading, "he did not seek to profit by the intermediate steps whereby that result was to be achieved" as being unsupported by any substantial evidence in the record and as contrary to the evidence.

(23) Plaintiff excepts to the conclusions in that part of the opinion marked 3 (pp. 34-36) as being based upon misconstruction of the facts, in conflict with facts found, and erroneous in law.

(24) Plaintiff excepts to the conclusions in that part of the opinion marked 4 (pp. 36-37) as being based upon misconstruction of the facts, in conflict with facts found, and erroneous in law.

(25) Plaintiff excepts to the conclusions in that part of the opinion marked 5 (pp. 37-38) as being based upon misconstruction of the facts, in conflict with facts found, and erroneous in law.

(26) Plaintiff excepts to the refusal of the Court to find that in 1933 the Commissioner of Internal Revenue determined that said \$80,063.56 paid by plaintiff to the Delaware Realty & Investment Company in 1931 was income to said company in that year, and that an additional tax was

due thereon, and that the plaintiff was called upon to and did in 1933 reimburse said company on account of said additional tax in the amount of \$9,607.98 together with interest thereon in the amount of \$663.98, a total of \$10,271.60.

(27) Plaintiff excepts to the refusal of the Court to find that the contract made by plaintiff with the Christiana Securities Company on December 23, 1919 was a transaction entered into for profit and in connection with his business of investor regularly carried on.

(28) Plaintiff excepts to the refusal of the Court to find that the contracts made by plaintiff with the Christiana Securities Company on January 4, 1923, on August 12, 1925, on October 28, 1926, and on January 21, 1929 were transactions entered into for profit and in connection with his business of investor regularly carried on.

(29) Plaintiff excepts to the refusal of the Court to find that the contract made by plaintiff with the Delaware Realty & Investment Company on October 25, 1929 was a transaction entered into for profit and in connection with his business of investor regularly carried on.

(30) Plaintiff excepts to the refusal of the Court to find that the payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company were ordinary and necessary expenses of his business of investor.

(31) Plaintiff excepts to the refusal of the Court to find that the payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company were payments required to be made as a condition to the continued use, for purposes of his business, of property in which plaintiff had no equity.

(32) Plaintiff excepts to the refusal of the Court to find that the payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company were for interest upon his indebtedness to that company.

(33) Plaintiff excepts to the refusal of the Court to find that the payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company were losses sustained during the taxable year in his business.

(34) Plaintiff excepts to the refusal of the Court to find that the payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company were losses incurred during the taxable year in a transaction entered into for profit.

(35) Plaintiff excepts to the refusal of the Court to hold that plaintiff was entitled under Section 23 of the Revenue Act of 1928 to deduct from his gross income, in computing net income for 1931, the sums of \$567,648 and \$80,063.56 paid by him to the Delaware Realty & Investment Company during that year.

(36) Plaintiff excepts to the refusal of the Court to hold that plaintiff is entitled to judgment against defendant in the sum of \$172,351.64, with interest from September 24, 1935, according to law.

(Sgd.) RICHARDS, LAYTON & FINGER,
Attorneys for Plaintiff.

IVINS, PHILLIPS, GRAVES & BARKER,
Of Counsel.

And thereafter on the sixth day of April, 1938, the Court entered the following order overruling said exceptions, viz.:

"And now, to wit, this 6th. day of April, A. D. 1938, upon reading and considering plaintiff's exceptions to the findings of fact, conclusions of law and opinion filed herein February 21, A. D. 1938,

"It is ORDERED by the court that said exceptions, and each and all of them, be and hereby are overruled;

"And further, that judgment be entered in favor of the said Pierre S. du Pont, Plaintiff, and against the said Willard F. Deputy, Collector of Internal Revenue for the District of Delaware, defendant, for the sum of fifty-four thousand four hundred thirty-nine dollars and fifty-two cents (\$54,439.52) with interest thereon from September 24, A. D. 1935.

(Sgd.) JOHN BIGGS, JR.,
Circuit Judge."

And thereafter counsel for the said Pierre S. du Pont did tender this bill of exceptions and did request the Judge before whom said cause was tried to authenticate and sign said bill of exceptions according to the form of statute in such case made and provided, which was done in Wilmington, in said District, this nineteenth day of May, 1938.

(Sgd.) JOHN BIGGS, JR.,
United States Circuit Judge.

JUDGMENT.

(Entered April 6, 1938.)

And now, to wit, this sixth day of April, A. D. 1938, it is considered and adjudged by the Court now here that the said Pierre S. du Pont, plaintiff, do have and recover of and from the said Willard F. Deputy, Collector of Internal Revenue for the District of Delaware, defendant, the sum of fifty-four thousand four hundred thirty-nine dollars and fifty-two cents (\$54,439.52) with interest thereon from September 24, A. D. 1935.

Attest:

(Sgd.) H. C. MAHAFFY, JR.,

Clerk.

PETITION FOR APPEAL.

(Filed April 27, 1938.)

Comes now Pierre S. du Pont, the above-named plaintiff, by Richards, Layton & Finger, his attorneys, feeling himself aggrieved by the judgment of this Court entered herein on the sixth day of April, 1938, in favor of the plaintiff for the sum of \$54,439.52 and interest does hereby appeal therefrom in so far as it awarded to the plaintiff only the amount conceded by defendant and denies the claim of the plaintiff for \$172,351.64 with interest from September 24, 1935, to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors which is filed herewith, and he prays that this appeal be allowed, that a citation be issued directed to the above-named defendant commanding him to appear before the United States Circuit Court of Appeals for the Third Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of record, proceedings, and papers, upon which said judgment

was made, be duly authenticated and sent to the United States Circuit Court of Appeals for the Third Circuit in accordance with law and its rules in order that the errors complained of may be considered and corrected.

Dated at Wilmington, in the District of Delaware,
April 27, 1938.

(Sgd.) RICHARDS, LAYTON & FINGER,
Attorneys for Plaintiff.

APPELLANT'S ASSIGNMENTS OF ERROR.

(Filed April 27, 1938.)

1. The Court erred in refusing to find that the payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company were ordinary and necessary expenses of his business.

2. The Court erred in refusing to find that the payments of \$567,648 and \$80,063.56 made by plaintiff to the Delaware Realty & Investment Company were for interest upon his indebtedness to that company.

3. The Court erred in refusing to hold that plaintiff was entitled under Section 23 of the Revenue Act of 1928 to deduct from his gross income, in computing net income for 1931, the sums of \$567,648 and \$80,063.56 paid by him to the Delaware Realty & Investment Company during that year.

4. The Court erred in entering judgment in favor of the plaintiff and against the defendant in the sum of only \$54,439.52 with interest thereon as provided by law.

5. The Court erred in refusing to enter judgment in favor of the plaintiff and against the defendant in the sum of \$172,351.64 with interest from September 24, 1935, according to law.

(Sgd.) RICHARDS, LAYTON & FINGER,
Attorneys for Appellant.

April 27, 1938.

ORDER ALLOWING APPEAL.

(Filed April 27, 1938.)

Upon the petition of plaintiff herein praying an appeal from the judgment entered herein on the sixth day of April, 1938, in favor of plaintiff for the amount of \$54,439.52 to the extent that said judgment denied plaintiff's claim for \$172,351.64 with interest, it is hereby

ORDERED that an appeal be allowed to the United States Circuit Court of Appeals for the Third Circuit as prayed for, and that a transcript of such part of the record herein as the parties by præcipe duly designate be transmitted duly authenticated to said United States Circuit Court of Appeals for the Third Circuit, in the manner provided by law.

IT IS FURTHER ORDERED that citation to the defendant be issued in regular course.

IT IS FURTHER ORDERED that plaintiff file a bond, with good and sufficient security, that he will prosecute his appeal to effect and if he fail to make his plea good shall answer to defendant for all costs, said bond to be in the sum of two hundred and fifty dollars (\$250).

(Sgd.) JOHN BIGGS, JR.,

United States Circuit Judge.

April 27, 1938.

[Bond for costs on appeal omitted by consent.]

[Citation on appeal omitted by consent.]

[Orders extending return day of citation on appeal omitted by consent.]

STIPULATION FOR DIMINUTION OF RECORD.

(Filed July 6, 1938.)

In order to eliminate duplications and matters irrelevant to the issues on appeal, it is stipulated that the Clerk of the United States District Court for the District of Delaware, in preparing the record for the Circuit Court of Appeals, be requested to—

(1) Print the docket entries.

(2) With respect to the complaint: Print all of first page; all of second page down to next to last word on next to last line. Omit last two words of next to last line, all of last line on page 2 and all of page 3 down to the semi-colon in seventh line from bottom, substituting asterisks to indicate elision.

Print balance of page 3, all of page 4 and the first twelve lines of page 5, omit balance of page 5, all of pages 6 and 7, and all but last seven lines of page 8, substituting asterisks to indicate elision.

Print balance of page 8, all of page 9, and bill of particulars.

Omit all exhibits annexed to complaint.

A footnote should be appended as follows: "Certain paragraphs and exhibits of the complaint are omitted as irrelevant to the issue on appeal having been disposed of by Stipulation No. 1 filed at the trial".

(3) Print defendant's pleas.

(4) With respect to bill of exceptions, omit title of case but print subtitle "Bill of Exceptions" and first seven lines thereunder. Omit next line and the ensuing stipulation and appearances, substituting asterisks to indicate elision.

Print "whereupon the parties offered and introduced the following two stipulations with the exhibits thereto attached, to wit:"

(5) Print Stipulation No. 1 (which eliminates certain issues and fixes amount of judgment in event of decision one way or the other).

(6) Print Stipulation No. 2, "Stipulation of Facts" together with all exhibits annexed thereto, except the computation annexed to Exhibit L, Exhibit M and Exhibit R. In place of the computation annexed to Exhibit L substitute: "The computation described in Exhibit L (letter from Irene du Pont, President, dated December 1919) is omitted by consent. It was a report on 'Net Asset Value Du Pont Common Stock', addressed to P. S. du Pont, Chairman, from Treasurer, showing detailed computation resulting in conclusion that net asset value of Du Pont common stock was \$320.94 per share, which said value is set out in the Court's finding number 22".

In place of Exhibit M, substitute "Exhibit M omitted by consent. It consisted of four ledger sheets of Laird & Company, brokers, showing transactions in Du Pont common stock from December 1, 1919 to July 2, 1920. It is agreed between the parties that the original Exhibits L and M may be filed with the Clerk of the Circuit Court of Appeals for the Third Circuit, if requested either by plaintiff or defendant".

In place of Exhibit R substitute, "Exhibit R to Stipulation of Facts omitted here by consent, being reproduced in full in paragraph 24 of the Findings of Fact of the District Court".

(7) Omit title of case and appearances, but print all of transcript of hearing on March 22, 1937, including opening statements, testimony of witnesses and colloquy between counsel and court at close of hearing.

(8) Print Exhibit 1, introduced at trial, but omit certificate at foot thereof.

Print Exhibit 2, introduced at trial, but omit certificate at foot thereof.

Omit Exhibits 3, 4, 6, 7, 8, 9, 13, 16 and 17, substituting "Exhibits 3, 4, 6, 7, 8, 9, 13, 16 and 17 omitted by consent—they were minutes of executive committee extending time of subcommittee to report".

Print Exhibit 5 introduced at trial, but omit certificate at foot thereof.

Print Exhibit 10, introduced at trial.

Print note "There was no Exhibit 11".

Print Exhibit 12, introduced at trial, but omit certificate at foot thereof.

Omit Exhibits 14 and 15, substituting "Exhibits 14 and 15, introduced at trial, omitted by consent. These were a letter from H. Fletcher Brown, Vice-President of Du Pont Company, to Richard V. Lindebury, dated December 3, 1919, requesting opinion on proposed agreement between company and executives, and Lindebury's reply, dated December 8, 1919, advising against such action. These exhibits are summarized in paragraph 11 of District Court's Findings of Fact".

Print Exhibit 16½, introduced at trial.

Print Exhibit 18, introduced at trial.

Omit Exhibit 19, substituting "Exhibit 19, introduced at trial, omitted by consent—it was a waiver extending the statute of limitations for assessment and collection of income tax".

Print note "There was no Exhibit 20".

Print Exhibit 21, introduced at trial.

(9) With respect to plaintiff's requests for findings of fact, print subtitle and the following statement: "Plaintiff's requests for findings of fact numbered 1, 2, 3, 4, 6, 7, 8, 12, 14, 15, 19, 20, 24, 32, 34 and 35 are omitted by consent as they are identical with the similarly numbered findings of the District Court hereinafter printed. Plaintiff's requests for findings of fact numbered 5, 10, and 13

are omitted by consent being substantially identical with the similarly numbered findings of the District Court hereinafter printed. Plaintiff's request for finding of fact numbered 11 is omitted by consent as it is identical with the District Court's finding numbered 11, except that the last sentence in the court's finding was not included in the request".

Print plaintiff's requests for findings of fact numbered 16, 17, 18, 21, 22, 23, 25, 26, 27, 28, 29, 30 and 31.

In lieu of plaintiff's request numbered 33, substitute "The first sentence of plaintiff's request numbered 33 is omitted by consent as being identical with the District Court's finding similarly numbered and hereinafter printed. The balance of plaintiff's request numbered 33 reads: '[print second and third sentences thereof]' "

Print plaintiff's requests for findings of fact numbered 36 to 47, inclusive.

Print plaintiff's requests for conclusions of law numbered 1 and 2.

(10) With respect to defendant's requests for findings of fact: Print statement "Defendant's requests for findings numbered 1 to 10 inclusive, 12, 14, 15, 19, 20, 21, 23, 24, 26, 27, 28, 29, 32, 33, 34, and 35 are omitted by consent as they are identical with the similarly numbered findings of the District Court hereinafter printed".

Defendant's requests for findings of fact numbered 13 and 25 are omitted by consent as being substantially identical with the similarly numbered findings of the District Court hereinafter printed.

In lieu of defendant's request for finding of fact numbered 11, print "Defendant's request for finding of fact numbered 11 is omitted here by consent as it is identical with the District Court's finding numbered 11; except that the last sentence in the court's finding was not included in the request".

Print defendant's requests for findings of fact numbered 16, 17, 18, 22, 30, 31 and 36 to 43 inclusive.

Omit defendant's request for conclusion of law numbered 1, substituting "Defendant's request for conclusion of law numbered 1 is omitted by consent as it is substantially identical with the District Court's conclusion numbered 1 hereinafter printed".

Omit defendant's request for conclusion of law numbered 2, substituting "Defendant's request for conclusion of law numbered 2 is omitted by consent as it is identical with the District Court's conclusion similarly numbered and hereinafter printed".

(11) Print findings of fact of District Court, with footnote "The exhibits incorporated in these findings by reference are reproduced ante. Those indicated by letters are exhibits to Stipulation No. 2, and those indicated by numbers are exhibits introduced at the trial".

(12) Print court's conclusions of law.

(13) Print court's opinion.

(14) Print plaintiff's exceptions to findings of fact, conclusions of law and opinion.

(15) Print court's order of April 6, 1938, overruling plaintiff's exceptions and directing judgment.

(16) Print judgment.

(17) Print petition for appeal.

(18) Print appellant's assignments of error.

(19) Print order allowing appeal.

(20) Omit bond for cost on appeal, substituting "Bond for costs omitted by consent".

(21) Omit citation on appeal, substituting "Citation on appeal omitted by consent".

(22) Omit orders extending return day of citation, substituting "Orders extending return day of citation on appeal omitted by consent".

RICHARDS, LAYTON & FINGER,
Attorneys for Plaintiff.
By **J. S. Y. IVINS,**
Counsel.

JOHN J. MORRIS, JR.,
U. S. Attorney, District of Delaware,
Attorney for Defendant.

JAMES W. MORRIS,
Assistant Attorney General.

ANDREW D. SHARPE,
LESTER L. GIBSON,
Special Assistants to Attorney General.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA, }
DISTRICT OF DELAWARE, } ss.:

I, HENRY C. MAHAFFY, JR., Clerk of the District Court of the United States for the District of Delaware, do hereby certify that I have carefully compared the foregoing writings with the respective originals thereof and find the same to be true and correct copies of said originals so full and complete as the same now remain on file and of record in my office, being a complete exemplification of the record and proceedings in the case of Pierre S. du Pont, Plaintiff-Appellant, v. Willard F. Deputy, Collector of Internal Revenue for the District of Delaware, Defendant-Appellee, No. 2 September Term, A. D. 1936, made up pursuant to the stipulation between counsel for respective parties filed in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at Wilmington, in said District, this twelfth day of August, A. D. 1938, and the Independence of the United States of America the one hundred and sixty-third.

(Sgd.) H. C. MAHAFFY, JR.,
Clerk U. S. District Court, District
of Delaware.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 6816. October Term, 1938

PIERRE S. DU PONT, PLAINTIFF-APPELLANT

v.

WILLARD F. DEPUTY, COLLECTOR OF INTERNAL REVENUE FOR THE
DISTRICT OF DELAWARE, DEFENDANT-APPELLEE

Stipulation

The defendant-appellee, Willard F. Deputy, having departed this life and Pearl E. Deputy and The Sussex Trust Company, a corporation of the State of Delaware, having duly qualified as administratrix and administrator of his estate, and the plaintiff-appellant being entitled in law to revive this cause against the personal representatives of the defendant-appellee, to simplify the proceedings to that end it is hereby

Stipulated that the cause may proceed with Pearl E. Deputy and the Sussex Trust Company, administratrix and administrator of the estate of Willard F. Deputy, substituted as parties defendant-appellee, in place of Willard F. Deputy, deceased.

RICHARDS, LAYTON & FINGER,

AARON FINGER,

Attorneys for Plaintiff-Appellant.

JOHN J. MORRIS, Jr.,

JAS. W. MORRIS,

Attorneys for Defendant-Appellee.

[Endorsements:] Stipulation to substitute Pearl E. Deputy and Sussex Trust Company, etc. Received and filed Sept. 16, 1938. William P. Rowland, clerk.

In the United States Circuit Court of Appeals for the Third Circuit

No. 6816. October Term, 1938

PIERRE S. DU PONT, PLAINTIFF-APPELLANT

v.

WILLARD F. DEPUTY, COLLECTOR OF INTERNAL REVENUE FOR THE
DISTRICT OF DELAWARE, DEFENDANT-APPELLEE

Order of substitution of party

On the annexed Stipulation of counsel it is hereby Ordered that Pearl E. Deputy and The Sussex Trust Company, a corporation of

the State of Delaware, as Executrix and Executor of the last Will and Testament of Willard F. Deputy, late Collector of Internal Revenue for the District of Delaware, Deceased, be substituted as parties defendant-appellee, in this action, and that all further proceedings therein be entitled "Pierre S. Du Pont, Plaintiff-Appellant, v. Pearl E. Deputy and The Sussex Trust Company, a corporation of the State of Delaware, as Administratrix and Administrator of the Estate of Willard F. Deputy, late Collector of Internal Revenue for the District of Delaware, Deceased, Defendant-Appellee." Albert B. Maris, United States Circuit Judge.

[Endorsements:] Order Substituting Pearl E. Deputy and Sussex Trust Company as Administratrix and Administrator of the Estate of Willard F. Deputy, etc. Received and filed Sept. 16, 1938. William P. Rowland, clerk.

In the United States Circuit Court of Appeals for the Third Circuit

No. 6816. October Term, 1938

PIERRE S. DU PONT, PLAINTIFF-APPELLANT

vs.

PEARL E. DEPUTY AND THE SUSSEX TRUST COMPANY, AS ADMINISTRATRIX AND ADMINISTRATOR OF THE ESTATE OF WILLARD F. DEPUTY, DECEASED, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF DELAWARE, DEFENDANTS-APPELLEES

And afterwards, to wit, the 10th day of October, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis, Honorable Albert B. Maris, and Honorable Joseph Buffington, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 28th day of March 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

Opinion

March 28, 1939

Appeal from the District Court of the United States for the District of Delaware

Before DAVIS, MARIS, and BUFFINGTON, Circuit Judges

BUFFINGTON, Circuit Judge: In the court below Pierre S. Du Pont brought suit against the Collector of Internal Revenue to recover taxes alleged to be illegally collected from him. Jury was waived and the case tried by the judge. By stipulation it was agreed

plaintiff was entitled to a judgment of \$54,439.52 on one of the issues involved and to a judgment of \$172,351.64 with interest (which would include the \$54,439.52) if plaintiff was successful in maintaining his claim therefor. The court entered judgment for plaintiff for \$54,439.52 with interest and held that "judgment for the plaintiff in any larger sum will be refused." Thereupon plaintiff took this appeal.

After due consideration, we are of opinion that in the latter respect the court erred and the record should be remanded with instructions to amend its judgment by making it for \$172,351.64 with interest from September 24, 1935, instead of for \$54,439.52 allowed. The reasons therefor we now state.

The income taxes involved are for the year 1931 as found by the court:

In 1919, the plaintiff maintained an office in Wilmington, Delaware, for the conduct of his business affairs. He had seven or eight employees in his office at that time. In 1920 he established an additional office in New York for the conduct of his business. He has maintained both such offices ever since such years. The expense of maintaining said offices was \$36,310.67 * * * In 1919 he devoted more or less 50 percent of his time to his investments, which consisted in a large part of du Pont Company stock, although he had other investments in securities of different corporations. He changed his investments from time to time by the sale and purchase of securities but he was not a speculator and had practically no investments in brokerage accounts.

It appears that in 1919 the plaintiff borrowed from the Christiana Company, with a ten year maturity provision dating from December 23, 1919, nine thousand shares of the stock of the du Pont Company. The purpose of the taxpayer in so borrowing was found by the trial court as follows:

In order to insure good management of the affairs of the du Pont Company by enlisting permanently the services of able men, to encourage the executive committeemen in future effort to benefit themselves and other stockholders, and in recognition of the good work done by the executive committee for the company, the plaintiff, at the instance of the du Pont Company offered to sell 1,000 shares of the common stock of the du Pont Company to each member of the executive committee of the du Pont Company. The plaintiff did not have the purpose or intention of making a profit by the specific transaction of the sale of the 1,000 shares of the common stock of the du Pont Company to each of the committeemen, but he did have the purpose and intention to conserve and enhance the value of his own substantial beneficial stock holdings in the du Pont Company by endeavoring to secure for the du Pont Company a stable and efficient management. He deemed this result would be best accomplished by causing the members of the executive committee to become stockholders in the du Pont Company.

The court further found:

The agreement referred to was not entered into by the plaintiff with the Christiana Company with the intention or purpose of making a profit thereby.

When the ten-year maturity approached, the court found "he (Du Pont) did not have 9,000 shares of the du Pont Company stock available for delivery * * *. The market for du Pont Company stock at this time was thin. Nine thousand shares of common stock of the du Pont Company could not have been purchased in the open market without substantially raising the price per share."

As noted above, du Pont's loan contract with the Christiana Company expired by its own terms December 23, 1929, a time, as the court takes judicial notice, of grave financial panicky conditions and at which Du Pont had not the stock to return.

In order to meet his contract at maturity Du Pont, on October 25, 1929, entered into a written contract with the Delaware Realty & Investment Company, of which he was not a shareholder, and which, as found by the court, "was not entered into * * * with the intention or purpose of making a profit thereby," whereby that company agreed to loan to Du Pont the shares of the du Pont Company required by him to return to the Christiana Company as provided in the then-maturing contract of stock loan made in 1919.

The contract with Delaware further provided that within ten years from October 25, 1929, Du Pont would return to the lending company the du Pont Company stock so borrowed and pending such return he would pay to the lending company an amount in money equivalent to all dividends declared by the du Pont Company on its stock and reimburse Delaware for all national and state taxes paid by it.

In 1931, the taxable year here involved, Du Pont so paid the lending company the equivalent dividends in the amount of \$567,648 declared by the du Pont Company and also the \$80,063.56, being the amount of the federal and state taxes paid by the Delaware Realty & Investment Company. It will thus appear that the total of these two sums, viz, \$647,711.56, is the deduction which the plaintiff claims should be allowed him as provided by statute, viz, "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

It will thus be seen that the basic question involved is whether these payments made by Du Pont during the taxable year of 1931 to the Delaware Realty & Investment Company were "necessary expenses" paid by him in carrying on his business.

The first question involved is whether the transactions stated constituted business. What, if anything, was Du Pont's business? By the court's finding and by common understanding as evidenced by dictionary definition, business is "that which busies or engages time, attention or labor as a principal serious concern or interest; any particular occupation or employment habitually engaged in.

especially for livelihood or gain." Adopting this view, the court below, as noted above (held—and rightly so—"The plaintiff's business was primarily that of conserving and enhancing his estate.")

Accordingly, we are of opinion the payments in question made during the taxable year were ordinary and necessary expenses paid by Du Pont during that year and as such are deductible. In view of these facts, we have not felt it necessary to discuss the question whether these sums—which were measured by the yardstick of dividends declared and taxes imposed—were in reality and substance "interest" payments. Nor are we constrained to discuss the voluminous papers and transactions bearing on the contract with the Christiana Company. Whatever they were, Du Pont was in 1929 confronted by a situation wherein he was bound to return the stock borrowed from Christiana. In that serious situation he turned to a third and wholly alien company, the Delaware Realty & Investment Company, in which he was not a stockholder, and bargained with it for a stock loan for ten years which enabled him to perform his contract with Christiana, avoid the possibly disastrous enforcement by Christiana of its maturing obligation to return the borrowed stock, and at the same time gave him, "through his contract with Delaware Realty & Investment Company a ten-year loan of the borrowed stock with "the option to reduce or extinguish his indebtedness to Delaware Realty & Investment Company hereunder by the return to Delaware Realty & Investment Company of the shares owing to it in such amounts and at such times as the said Pierre S. Du Pont may desire."

So regarding, the record is remanded to the court below for further procedure in accordance with this opinion.

MARIS, Circuit Judge, concurring: Section 23 of the Revenue Act of 1928 provides that in computing net income for income tax purposes there shall be allowed as deductions "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." The District Court found as a fact in this case that "the plaintiff's business was primarily that of conserving and enhancing his estate." The finding was undoubtedly supported by ample evidence. If we premise this fact, as I think we must, it follows that the plaintiff was entitled, in computing his taxable net income for the year 1931, to deduct all the ordinary expenses paid during that year which were necessary to conserve his estate.

At the beginning of the year the plaintiff was faced with the fact that he owed the Delaware Realty and Investment Company 141,912 shares of common stock of E. I. du Pont de Nemours & Company. The history of this loan and the purposes for which the stock was borrowed are in my view wholly irrelevant. Whatever the reason, the fact remained that in 1931 he found himself under a binding obligation to the Delaware Company either to return the borrowed stock or to pay an amount equivalent to the dividends on the bor-

rowed shares plus the taxes paid by the Delaware Company by reason of the loan. Since he no longer owned the shares borrowed, the return of them would have necessarily involved the depletion of his estate by the amount required to purchase an equivalent number. He elected to take the only other course which was open to him and paid to the Delaware Company the sum of \$647,711.56, which represented the amount of the dividends paid on the stock plus the taxes of the Delaware Company with respect thereto.

This payment unquestionably conserved the plaintiff's estate. If it had not been made his invested funds would have faced the certainty of a serious diminution. The necessity of the expense is clear. The diminution of his principal, which would have resulted if the payment had not been made, would undoubtedly have carried with it an inevitable diminution in taxable income which might well have been substantially equivalent to the deduction here sought. The inherent justice of his claim will thus be seen.

I am equally satisfied that the expense was an ordinary one within the meaning of the statute. Certainly there is no expense in human experience which is more ordinary than that incurred by a debtor in fulfilling his agreement with his creditors. It is true that this expense usually takes the form of interest. It may well be that the expenditure which the plaintiff made in this case was a payment of interest in the broadest sense. It is certain, however, that it was compensation for the loan of stock which he had made and as such it was an ordinary and usual expense of a transaction of that character. *Dart v. Commissioner of Internal Revenue*, 74 F. 2d 845.

I accordingly concur in the conclusion reached by my colleagues that the amount of the judgment entered by the District Court in favor of the plaintiff should be increased from \$54,439.52 to \$172,351.64.

In the United States Circuit Court of Appeals for the Third Circuit

No. 6816. October Term, 1938

PIERRE S. DU PONT, PLAINTIFF-APPELLANTS

vs.

PEARL E. DEPUTY AND THE SUSSEX TRUST COMPANY, AS ADMINISTRATRIX AND ADMINISTRATOR OF THE ESTATE OF WILLARD F. DEPUTY, DECEASED, LATE COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF DELAWARE, DEFENDANTS-APPELLEES

On appeal from the District Court of the United States, for the District of Delaware

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of Delaware, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed, and the case remanded to the said District Court with instructions to enter judgment in favor of the plaintiff for the sum of \$172,351.64, with interest from September 24, 1935.

Philadelphia, March 28, 1939.

Per Curiam.

BUFFINGTON, *Circuit Judge.*

[Endorsements:] Order Reversing Judgment, etc. Received & filed Mar. 28, 1939. Wm P. Rowland, Clerk.

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, Third Judicial Circuit, Sct.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Pierre S. Du Pont, Plaintiff-Appellant vs. Pearl E. Deputy and The Sussex Trust Company, as Administratrix and Administrator of the Estate of Willard F. Deputy, Deceased, Late Collector of Internal Revenue for the District of Delaware, Defendants-Appellees. No. 6816, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 8th day of June, in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States the one hundred and sixty-third.

[SEAL]

WM. P. ROWLAND,

Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Supreme Court of the United States

Order allowing certiorari

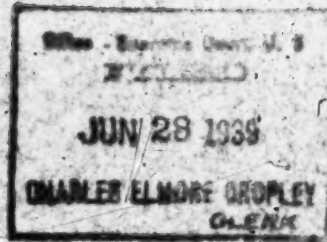
Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

FILE COPY



No. **151**

In the Supreme Court of the United States

OCTOBER TERM, 1939

PEARL E. DEPUTY AND THE SUSSEX TRUST CO., A
CORPORATION OF THE STATE OF DELAWARE, AS
ADMINISTRATRIX AND ADMINISTRATOR OF THE
ESTATE OF WILLARD F. DEPUTY, DECEASED, LATE
COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

PIERRE S. DU PONT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

INDEX

	Page
Opinions below.....	2
Jurisdiction.....	2
Question presented.....	2
Statute involved.....	2
Statement.....	3
Specification of errors to be urged.....	8
Reasons for granting the writ.....	9
Conclusion.....	16

CITATIONS

Cases:	
<i>Ahles Realty Corp. v. Commissioner</i> , 71 F. (2d) 150.....	12
<i>Bedell v. Commissioner</i> , 30 F. (2d) 622.....	16
<i>Bing v. Helvering</i> , 76 F. (2d) 941.....	10
<i>Bonwit Teller & Co. v. Commissioner</i> , 53 F. (2d) 381, certiorari denied, 284 U. S. 690.....	16
<i>Burnet v. Clark</i> , 287 U. S. 410.....	9, 10
<i>Burnet v. Commonwealth Imp. Co.</i> , 287 U. S. 415.....	9
<i>Central Bank Block Ass'n. v. Commissioner</i> , 57 F. (2d) 5.....	16
<i>Commissioner v. Ashland Oil & R. Co.</i> , 90 F. (2d) 588, certiorari denied, No. 692, 693, October Term, 1938, April 17, 1939.....	12, 13, 16
<i>Cripple Creek Coal Co. v. Commissioner</i> , 63 F. (2d) 829.....	12, 13
<i>Dalton v. Bowers</i> , 287 U. S. 404.....	9
<i>du Pont v. Commissioner</i> , 37 B. T. A. 1198.....	11, 13
<i>Helvering v. Winmill</i> , 305 U. S. 79.....	16
<i>Kales v. Commissioner</i> , 101 F. (2d) 35.....	14
<i>Kane v. Commissioner</i> , 100 F. (2d) 382.....	13, 14
<i>Kenan v. Bowers</i> , 50 F. (2d) 112.....	10
<i>Kornhauser v. United States</i> , 276 U. S. 145.....	9, 10
<i>Martin v. Commissioner</i> , 28 F. (2d) 748.....	9
<i>Menihan v. Commissioner</i> , 79 F. (2d) 304, certiorari denied, 296 U. S. 651.....	10, 12
<i>Miller v. Commissioner</i> , 102 F. (2d) 476.....	14
<i>Monell v. Helvering</i> , 70 F. (2d) 631.....	14
<i>Park v. Commissioner</i> , 58 F. (2d) 965, certiorari denied, 287 U. S. 645.....	10
<i>Prairie Oil & Gas Co. v. Moller</i> , 66 F. (2d) 309.....	12
<i>Starr v. Commissioner</i> , 82 F. (2d) 964, certiorari denied, 298 U. S. 680.....	12

Cases—Continued.

	Page
<i>Terbell v. Commissioner</i> , 71 F. (2d) 1017, affirming, 29 B. T. A. 44.....	15
<i>Van Dyke v. Helsering</i> , 291 U. S. 642.....	9
<i>Van Wart v. Commissioner</i> , 295 U. S. 112.....	14
<i>Welch v. Helsering</i> , 290 U. S. 111.....	11
Statute:	
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 23.....	2
Sec. 24.....	2
Miscellaneous:	
G. C. M. 670 V-2 Cum. Bull. 115.....	10

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. —

**PEARL E. DEPUTY AND THE SUSSEX TRUST CO., A
CORPORATION OF THE STATE OF DELAWARE, AS AD-
MINISTRATRIX AND ADMINISTRATOR OF THE ESTATE
OF WILLARD F. DEPUTY, DECEASED, LATE COL-
LECTOR OF INTERNAL REVENUE, PETITIONERS**

v.

PIERRE S. DU PONT

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT**

The Solicitor General, on behalf of Pearl E. Deputy and the Sussex Trust Company, a corporation of the State of Delaware, as administratrix and administrator of the Estate of Willard F. Deputy, deceased, late Collector of Internal Revenue for the District of Delaware, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above entitled cause on March 28, 1939, reversing the decision of the District Court of the United States for the District of Delaware.

OPINIONS BELOW

The opinion of the District Court (R. 208-243) is reported in 22 F. Supp. 589. The opinion of the Circuit Court of Appeals (R. —) is reported in 103 F. (2d) 257.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 28, 1939 (R. —). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the expenditures in question are deductible from gross income as ordinary and necessary business expenses.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General rule*.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses;

STATEMENT

At the close of the World War the du Pont Company foresaw that its business, which up to that time had been chiefly the manufacture of munitions and war supplies, would have to be changed. It was thought desirable for the conduct of peacetime affairs to appoint a new executive committee of the corporation (R. 209-210). In order that the nine members of the executive committee might devote their best time and energy to the interests of the company, the chairman of the board, early in 1919, recommended to the finance committee that the question of proper compensation for the new members of the executive committee be taken up by a special committee, which was done (R. 210). The plan recommended involved, among other things, the issuance to each executive committeeman of 1,000 shares of stock in the company at \$400 per share, to be paid off in part by a \$150,000 bonus at the end of five years. The company's counsel, however, advised that the corporation had no power to carry out this arrangement, since under Delaware law stock could not be issued for future services, and stock issued for cash had first to be offered to existing stockholders pro rata (R. 211). Thereupon, Pierre S. du Pont, the taxpayer, at the instance of the du Pont Company, agreed to sell to each of the committeemen, at the asset value, 1,000 shares of du Pont Company stock (R. 212-213).

In entering into the above transaction, the taxpayer did not have the purpose or intention of

making a profit from the sale, but he did have the purpose and intention to conserve and enhance the value of his own substantial beneficial stock holdings in the du Pont Company (R. 213).

The taxpayer did not have available 9,000 shares of the common stock of the du Pont Company for this purpose, for in December, 1919, he owned only 74 shares. He had a reversionary interest in two trusts created by him which held 24,000 shares. He was also a substantial stockholder in the Christiana Securities Company which was the largest single owner of du Pont Company stock, owning 183,000 shares out of a total of 588,512 shares issued and outstanding (R. 213).

In order to secure the stock which he had agreed to sell, he arranged with the Christiana Securities Company to lend him 9,000 shares. The resolution of the Christiana Securities Company authorizing the loan recited that the company was the principal stockholder of the du Pont company and interested in its success. The terms of the agreement with the Christiana Securities Company were in substance that he would return similar shares at the end of a ten-year period, and in the meantime would pay to the Christiana Securities Company amounts equivalent to all dividends declared and paid on the shares he had borrowed. Plaintiff did not enter into this agreement with the intention or purpose of making a profit thereby (R. 47, 48-49, 213-214).

Taxpayer sold 1,000 shares of the du Pont Company to each of the nine executive committeemen at \$320 per share, and received \$320,000 in cash from each. The men had obtained the cash from the du Pont Company, which had loaned the money to each member for a period of five years upon the basis of the du Pont stock as collateral. The Company's contract of employment with each of the members of the committee provided for an additional compensation of \$150,000 if the committeeman remained in the employ of the company for the five years (R. 214-215).

By the early part of 1921 the value of du Pont Company stock had materially decreased so that it seemed possible that the committeemen, instead of receiving a benefit from the transaction, would sustain a severe loss. When this condition appeared, the taxpayer wrote to each of the committeemen a letter in which he stated the motives which had prompted him in the first instance, made plain that he had no intention to make a profit for himself from the sale to the committeemen, stated that it was still important for the company to retain the services of good men, and adjusted the original transaction with the result that he gave to each of the committeemen stock in the Christiana Securities Company having a value of \$160,000, subject to an option in him to repurchase for that sum at the price of the maturity of the loan made by the du Pont Company (R. 216-217).

At the end of ten years, the taxpayer was not ready to return to the Christiana Securities Company the stock he had borrowed. He entered into an agreement with the Delaware Realty and Investment Company to lend him 142,212 shares of du Pont Company stock to discharge his obligation to the Christiana Securities Company.¹ The agreement recited that taxpayer, while not contemplating the closing of the short sale transaction of December, 1919, desired to return the shares to the Christiana Securities Company. The agreement provided that he would return the borrowed shares to the Delaware Realty and Investment Company within ten years after October 25, 1929, and in the meantime would pay to the Company amounts equivalent to all dividends declared by the du Pont Company upon the borrowed shares, together with amounts equal to any tax liability imposed upon the Delaware Realty and Investment Company, because of the receipt from the taxpayer of the aforesaid sums, which would not have accrued but for the execution of the agreement. During 1929, taxpayer returned 300 shares, reducing his obligation to 141,912 shares. (R. 98-103, 218-219.)

In 1931 the taxpayer paid to the Delaware Realty and Investment Company \$567,648, a sum equal in amount to the dividends paid by the du Pont Company upon the stock borrowed as aforesaid, and an additional sum of \$80,063.56, which was the

¹ The original 9,000 shares had been augmented by stock dividends (R. 217-218).

amount of federal income tax imposed upon the Delaware Realty and Investment Company by reason of the payments which it had received from the taxpayer (R. 219). These are the expenditures which are involved in the present litigation.

The taxpayer had in 1919, 1920 and 1931, large and diversified investments in stocks and securities. In 1919, he devoted about 50 per cent of his time to his investments, which consisted in a large part of du Pont Company stock. He changed his investments from time to time, but he was not a speculator and had practically no investments in brokerage accounts. By 1929 he had parted with a large part of his du Pont Company stock, but had retained a large ownership in the Christiana Securities Company; his largest holdings were then in General Motors Corporation. The District Court found that taxpayer's business was primarily that of conserving and enhancing his estate. He entered into the transaction here in question with the intention and purpose and to the end that his beneficial stock ownership in the du Pont Company might be conserved and enhanced (R. 220-221).

On his income tax return for the calendar year 1931, taxpayer deducted the amounts of \$567,648, and \$80,063.56, paid to the Delaware Realty and Investment Co., as aforesaid. The Commissioner in assessing and collecting a deficiency refused to allow these deductions (R. 219-220). The taxpayer brought suit for refund (R. 5-9). The District

Court granted a judgment for \$54,439.52, relating to other matters, but held that the sums of \$567,648 and \$80,063.56 were not deductible from the gross income of the taxpayer upon any of the grounds suggested by him. (R. 208-243). Upon appeal the Circuit Court of Appeals held that the sums were deductible as ordinary and necessary business expenses (R. —).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the expenditures were proximately or directly connected with taxpayer's assumed business of conserving and enhancing his estate.
2. In holding that the expenditures were "ordinary" expenses in such business.
3. In refusing to consider the transaction as a whole and take into account the history and purpose of the borrowing of the shares.
4. In holding that the conservation of a taxpayer's estate constitutes a business.
5. In holding that Section 23 (a) of the Revenue Act of 1928 permits the deduction of amounts expended for the purpose of conserving and enhancing the taxpayer's estate.
6. In failing to hold that the sums of \$567,648 and \$80,063.56 were in the nature of capital expenditures which are not deductible from gross income.
7. In reversing the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. Section 23 (a) of the Revenue Act of 1928, *supra*, p. 2, permits the deduction from gross income of ordinary and necessary expenses paid or incurred in carrying on a trade or business. The decision of the court below allowing the deduction is in conflict with decisions of this Court, announcing the principles correctly applied by the trial court, and with certain decisions of the circuit courts of appeals.

Thus, this Court has settled the principle that a payment does not constitute an item deductible under Section 23 (a) unless it proximately results from, or is directly connected with, the taxpayer's business. *Kornhauser v. United States*, 276 U. S. 145, 153. And a stockholder's business must be sharply distinguished from that of the corporation in which he holds stock: *Dalton v. Bowers*, 287 U. S. 404; *Burnet v. Clark*, 287 U. S. 410; *Burnet v. Commonwealth Imp. Co.*, 287 U. S. 415; *Van Dyke v. Helvering*, 291 U. S. 642.

In *Burnet v. Clark*, *supra*, losses suffered by a majority stockholder and officer, through endorsement of obligations of the corporation, were held not net losses attributable to his business, but transactions intended to preserve the value of his investment in its capital shares. Expenditures made in the best interests of the corporation, and intended to benefit the taxpayer through his stock holdings, are capital in nature. They may not be deducted as losses (*Mastin v. Commissioner*, 28 F. (2d) 748 (C.

C. A. 8th); *Menihan v. Commissioner*, 79 F. (2d) 304 (C. C. A. 2d), certiorari denied, 296 U. S. 651; *Park v. Commissioner*, 58 F. (2d) 965 (C. C. A. 2d), certiorari denied, 287 U. S. 645; and, similarly, the doctrine of *Burnet v. Clark* precludes their deduction as business expenses. *Bing v. Helvering*, 76 F. (2d) 941, 942 (C. C. A. 2d).

These decisions plainly govern the present case. Taxpayer's purpose in his entire course of conduct was to conserve and enhance the value of the shares in the du Pont Company beneficially owned by him by securing an efficient management for the corporation (R. 212-213; 215-217; 221; 229). This was obviously the business of the du Pont Company itself. Indeed, the taxpayer's personal participation, at the instance of the company, came only after the company's initial proposal that the company itself compensate the executive committeemen through its shares was found constitutionally objectionable (R. 210-211, 213): Assuming, for the purpose of argument, that taxpayer was in business as an investor,² the payments in question were expended in the business of the corporation, and, as the District Court stated, they were not proximately or directly connected with the taxpayer's business of enhancing his investments.³ *Kornhauser v. United States, supra.*

² See *infra*, pp. 13-15, for a consideration of the nature of taxpayer's "business."

³ See *Kenan v. Bowers*, 50 F. (2d) 112 (C. C. A. 2d); G. C. M. 670, V-2 Cum. Bull. 115.

Furthermore, the expenditure, made upon a long-term loan of securities obtained in order to cover what is essentially a short sale, was found by the District Court not to be ordinary in the lives of business men (R. 235). Accordingly, under the doctrine of *Welch v. Helvering*, 290 U. S. 111, 114, 115, the payment was not deductible.

2. The District Court correctly applied the foregoing principles of law to findings of fact not subject to attack. In reversing the judgment, the Court of Appeals avoided the issues discussed by the District Court by refusing to take into consideration the history and purpose of the borrowing and by viewing the situation solely from the standpoint of the necessity for the 1929 agreement.⁴

This narrow approach was its critical error.⁵ It is well established that component steps of a single

⁴ Even on this approach, the opinion of the Court of Appeals reflects an erroneous and unwarranted assumption of facts that the agreement was negotiated because of a positive benefit to the taxpayer. The District Court found that the 1929 agreement with the Delaware Company was not entered into with the intention of making a profit (R. 218-219). When the Court of Appeals discussed the reason for entering into the 1929 agreement, it quoted a finding which stated: "The market for du Pont Company stock was thin. Nine thousand shares of common stock of the du Pont Company could not have been purchased in the open market without substantially raising the price per share." The Court of Appeals stated (R. —) that this finding was made as to the situation "when the ten year maturity approached," i. e. in 1929. Actually the finding quoted (Fdg. 18, R. 214) referred to the situation in 1919.

⁵ The Board of Tax Appeals took the contrary position in *du Pont v. Commissioner*, 37 B. T. A. 1198, 1273.

transaction are to be viewed as a whole and may not be treated separately for tax purposes. *Commissioner v. Ashland Oil & R. Co.*, 99 F. (2d) 588 (C. C. A. 6th), certiorari denied, No. 692, 693, October Term, 1938, April 17, 1939; *Starr v. Commissioner*, 82 F. (2d) 964 (C. C. A. 4th), certiorari denied, 298 U. S. 680; *Altes Realty Corp. v. Commissioner*, 71 F. (2d) 150, 151 (C. C. A. 2d); *Prairie Oil & Gas Co. v. Motter*, 66 F. (2d) 309, 311 (C. C. A. 10th). The opinion of the court below would have permitted the deduction even though the taxpayer had originally borrowed the shares as a personal indebtedness, say, to build a residence. It is plain, however, that the character of a payment upon a liability or debt can be determined only in the light of the purpose and history of the obligation. In ignoring those factors, the court below rendered a decision conflicting in principle with *Menihan v. Commissioner*, 79 F. (2d) 304, cited *supra*, p. 10; *Cripple Creek Coal Co. v. Commissioner*, 63 F. (2d) 829 (C. C. A. 7th).

In *Menihan v. Commissioner*, the court rejected the taxpayer's claim that he had suffered a loss because he had made payment, without recourse, upon a liability which at the time of payment was his own liability. The court inquired into the history of the liability, and determined that originally the taxpayer had endorsed a corporation note to protect his investment in its stock, and that the

creditors' adjustment which made this his own primary debt without recourse was part of an entire arrangement which preserved the value of his shares and represented a capital contribution. In the *Cripple Creek Coal Co.* case, the court held that certain payments were not for ordinary and necessary expenses since in substance they represented instalments in satisfaction of a debt owing to a customer because of its advances toward the cost of a spur track, and therefore the payments were a capital investment. See also *Commissioner v. Ashland Oil Co.*, *supra*, where the cost of borrowing money was held a part of the cost of the property purchased with the borrowed money.

3. Moreover, apart from the grounds argued above for the disallowance of the deduction, the court below erred in assuming that conserving and enhancing one's estate constitutes the carrying on of a trade or business, within the meaning of Section 23 (a).^{*} Practically everyone devotes time and energy to the conservation and enhancement of his estate, and to consideration of the prudence of his investments. This is not considered a "business." *Kane v. Commissioner*, 100 F. (2d)

^{*} In *d Pont v. Commissioner*, 37 B. T. A. 1198, 1273, 1274, the Board assumed, without deciding, that petitioner was in the business of an investor, managing his investments. It disallowed the deduction on the grounds stated in the opinion of the District Court below.

382 (C. C. A. 2d);¹ see *Van Wart v. Commissioner*, 295 U. S. 112, 116, and cases cited; *Monell v. Helvering*, 70 F. (2d) 631 (C. C. A. 2d). Such an investment expense is a personal one, the deduction of which is specifically prohibited by the Revenue Act. Section 24 (a), *supra*, p. 2.

The opinion below serves to obliterate the distinction between personal and business expenses. It permits a taxpayer to convert purely personal and capital expenses into ordinary and necessary expenses by the simple expedient of treating the conservation of his estate as a business, and proceeding to deduct the expense of "conserving" his

¹ In *Kane v. Commissioner*, the taxpayer, through her agent, "changed investments continually, substituting and changing, and reinvesting the income." The court noted that the proof did not show the extent of the activity in the purchase and sale of securities, and ruled that it would not constitute a business for the taxpayer to do merely "what is necessary from an investment point of view," or "to secure or attempt to secure income or capital stability" (100 F. (2d) at 383). Other decisions have indicated that investment activity may constitute a business, if it is sufficiently extensive and regular. *Kales v. Commissioner*, 101 F. (2d) 35 (C. C. A. 6th); see *Miller v. Commissioner*, 102 F. (2d) 476, 479 (C. C. A. 9th). It is not clear that these decisions would control the present case. Taxpayer testified that he changed his investments in "quite a number of transactions" (R. 153, 156), that he spent 50 per cent. of his time in "looking after my investments" (R. 151), and had two offices (R. 152-153). In any event these decisions are unsound since they simply lead to the conclusion that a wealthy investor, whose investments necessarily generate more activity, may deduct investment expenses while the average, moderate investor may not.

estate by doing an act resulting in deferring liquidation of his personal indebtedness.

4. The taxpayer sold the stock to the committee-men in 1919 without relinquishing ownership of any shares, but borrowing those necessary to make delivery. In other words, he used the mechanics of a short sale, although he did not have the intention to make a profit which characterizes the usual short sale. If this be deemed a short sale, the decision below is in conflict with *Terbell v. Commissioner*, 71 F. (2d) 1017 (C. C. A. 2d), affirming, 29 B. T. A. 44. In that case the taxpayer in 1928 sold short 9,000 shares of corporate stock. In order to make delivery of the stock, he borrowed an equal number of shares and delivered them to the purchaser. As part of the contract in borrowing the 9,000 shares, taxpayer had obligated himself to pay to the lender a sum equal to the dividends declared and paid during the year. The Board of Tax Appeals approved the Commissioner's determination that the sum, equal in amount to the dividends, paid over by the borrower was an item of cost to be taken into consideration when the transaction was completed by a covering purchase, and that it was not an ordinary and necessary business expense. The Board also stated that the taxpayer was not in the business of making short sales or dealing in securities generally, but this statement, if material, was at most an alternative ground of decision, since a capital expenditure

does not become an ordinary and necessary expense merely because the taxpayer is engaged in business. *Helvering v. Winmill*, 305 U. S. 79. The Circuit Court of Appeals for the Second Circuit affirmed the Board *per curiam*. One of the cases cited by it dealt with the definition of the business of buying and selling securities (*Bedell v. Commissioner*, 30 F. (2d) 622 (C. C. A. 2d)), but the other two citations held a certain expenditure to be a capital item (*Bonwit Teller & Co. v. Commissioner*, 53 F. (2d) 381 (C. C. A. 2d), certiorari denied, 284 U. S. 690; *Central Bank Block Assn. v. Commissioner*, 57 F. (2d) 5 (C. C. A. 5th)). And compare *Commissioner v. Ashland Oil Co.*, *supra*, holding that where money is borrowed in order to purchase a capital asset the expense of borrowing is part of the cost of the capital item.

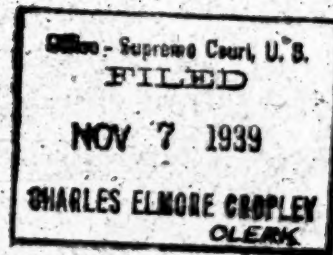
CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition be granted.

ROBERT H. JACKSON,
Solicitor General.

JUNE, 1939.

FILE COPY



No. 151

In the Supreme Court of the United States

OCTOBER TERM, 1939

**PEARL E. DEPUTY AND THE SUSSEX TRUST CO., A
CORPORATION OF THE STATE OF DELAWARE, AS AD-
MINISTRATRIX AND ADMINISTRATOR OF THE ESTATE
OF WILLARD F. DEPUTY, DECEASED, LATE COLLEC-
TOR OF INTERNAL REVENUE, PETITIONERS**

v.

PIERRE S. DU PONT

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT**

BRIEF FOR THE PETITIONERS

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Question presented.....	2
Statute involved.....	2
Statement:	
1. The nature of the payments made.....	3
2. The nature of respondent's activities during the years in question.....	11
3. Proceedings below.....	12
Specification of errors to be urged.....	13
Summary of Argument.....	14
Argument:	
Introductory Statement.....	20
I. The Payments Are Not Deductible As Ordinary and Necessary Expenses Paid or Incurred in Carrying On a Trade or Business.....	22
A. Respondent's Activities in Connection With Conserving and Enhancing His Estate Did Not Constitute a "Trade or Business".....	22
B. The Payments Were Not Expenses Paid or Incurred in Carrying Out Respondent's "Business" of Conserving and Enhancing his Estate.....	27
C. The Payments Were Not "Ordinary and Necessary" Expenses.....	34
II. The Payments Are Not Deductible As Interest Paid on Indebtedness.....	40
Conclusion.....	47

CITATIONS

Cases:

<i>Ahles Realty Corp. v. Commissioner</i> , 71 F. (2d) 150.....	29
<i>Baltimore & O. R. Co. v. Commissioner</i> , 78 F. (2d) 460.....	41
<i>Bedell v. Commissioner</i> , 30 F. (2d) 622.....	24
<i>Bing v. Helvering</i> , 76 F. (2d) 941.....	32
<i>Bonwit Teller & Co. v. Commissioner</i> , 53 F. (2d) 381.....	24
<i>Briarcliff Investment Co. v. Commissioner</i> , 30 B. T. A. 1269.....	24
<i>Brush-Moore Newspapers, Inc. v. Commissioner</i> , 37 B. T. A. 787.....	44
<i>Burnet v. Clark</i> , 287 U. S. 410.....	16, 31, 32
<i>Burnet v. Commonwealth Imp. Co.</i> , 287 U. S. 415.....	31
<i>City of Lincoln, Neb. v. Ricketts</i> , 77 F. (2d) 425.....	41
<i>Commissioner v. Ashland Oil & R. Co.</i> , 99 F. (2d) 588, cer- tiorari denied, 306 U. S. 661.....	29
<i>Corbett Investment Co. v. Helvering</i> , 75 F. (2d) 525.....	41
<i>Cripple Creek Coal-Co. v. Commissioner</i> , 63 F. (2d) 829.....	29
<i>Dalton v. Bowers</i> , 287 U. S. 404.....	16, 31
<i>Dart v. Commissioner</i> , 74 F. (2d) 845, reversing 29 B. T. A. 125.....	24, 39

Cases—Continued.

	Page
<i>De Ganay v. Lederer</i> , 250 U. S. 376.....	41
<i>Dry Dock Bank, The v. The American Life Ins. and Trust Co.</i> , 3 N. Y. 344.....	41
<i>du Pont v. Commissioner</i> , 37 B. T. A. 1198.....	29, 37
<i>Fall River Electric Light Co. v. Commissioner</i> , 23 B. T. A. 168.....	41, 42
<i>Foss v. Commissioner</i> , 75 F. (2d) 326.....	27
<i>Hayes v. Commissioner</i> , 261 Mass. 134.....	41
<i>Helbering v. Independent Life Ins. Co.</i> , 292 U. S. 371.....	21, 44
<i>Hutton v. Commissioner</i> , 39 F. (2d) 459.....	24
<i>Kales v. Commissioner</i> , 101 F. (2d) 35.....	27
<i>Kane v. Commissioner</i> , 106 F. (2d) 382.....	24
<i>Kenan v. Bowers</i> , 50 F. (2d) 263.....	34
<i>Kishti v. Humble Oil & Refining Co.</i> , 10 F. (2d) 356.....	41
<i>Kissel v. Commissioner</i> , 15 B. T. A. 1270.....	27
<i>Kornhauser v. United States</i> , 276 U. S. 145.....	16, 31, 34
<i>Lynch v. Alceorth-Stephens Co.</i> , 267 U. S. 364.....	43
<i>Maillard v. Lawrence</i> , 16 How. 251.....	41
<i>Maryland Casualty Co. v. Omaha Electric L. & P. Co.</i> , 157 Fed. 514.....	41
<i>Martin v. Commissioner</i> , 28 F. (2d) 748.....	32
<i>Mehan v. Commissioner</i> , 79 F. (2d) 304, certiorari denied, 296 U. S. 651.....	29, 32
<i>Miller v. Commissioner</i> , 102 F. (2d) 476.....	27
<i>Monell v. Helvering</i> , 70 F. (2d) 631.....	24
<i>New Colonial Co. v. Helvering</i> , 292 U. S. 435.....	20, 44
<i>New Orleans Land Co. v. Commissioner</i> , 29 B. T. A. 35.....	41, 42
<i>Old Colony R. Co. v. Commissioner</i> , 284 U. S. 552.....	19, 21, 41, 43
<i>Park v. Commissioner</i> , 58 F. (2d) 965, certiorari denied, 287 U. S. 645.....	32
<i>Prairie Oil & Gas Co. v. Motter</i> , 66 F. (2d) 309.....	29
<i>Provost v. United States</i> , 269 U. S. 443.....	36
<i>Richmond, Fredericksburg & Potomac R. Co. v. Commissioner</i> , 33 B. T. A. 895, affirmed, 90 F. (2d) 971.....	45
<i>Sacks v. Commissioner</i> , 66 F. (2d) 308.....	24
<i>Starr v. Commissioner</i> , 82 F. (2d) 964, certiorari denied, 298 U. S. 680.....	29
<i>Terbell v. Commissioner</i> , 29 B. T. A. 44, affirmed, 71 F. (2d) 1017.....	36, 41
<i>Title Guaranty & Surety Co. v. Klein</i> , 178 Fed. 689.....	41
<i>Tonningsen v. Commissioner</i> , 61 F. (2d) 199.....	24
<i>Van Dyke v. Helvering</i> , 294 U. S. 642.....	31
<i>Van Wart v. Commissioner</i> , 295 U. S. 112.....	24
<i>von Echt v. Commissioner</i> , 21 B. T. A. 702, 27 B. T. A. 1419.....	27
<i>Welch v. Helvering</i> , 290 U. S. 111.....	18, 21, 38
<i>Westerfield v. Rofferty</i> , 4 F. (2d) 590.....	41
<i>White v. United States</i> , 305 U. S. 281.....	20, 44
<i>Woolford Realty Co. v. Ross</i> , 286 U. S. 319.....	21, 44

Statutes:

Revenue Act of 1928, c. 852, 45 Stat. 701:

Sec. 23 (a)..... 2, 14, 15, 20, 21, 22, 27, 34, 40

Sec. 23 (b)..... 3, 18, 20, 21, 40

Sec. 24..... 3, 25

Delaware Revised Code 1935, Sec. 3101..... 41

In the Supreme Court of the United States

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No. 151

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v.

PIERRE S. DU PONT

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE THIRD CIRCUIT**

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the District Court (R. 208) is reported in 22 F. Supp. 589. The opinion of the Circuit Court of Appeals (R. 264) is reported in 103 F. (2d) 257.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 28, 1939 (R. 268). The peti-

tion for a writ of certiorari was filed on June 28, 1939 and was granted on October 9, 1939 (R. 270). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether respondent, in computing his net taxable income for the year 1931, was entitled to deduct certain payments made by him in that year to the Delaware Realty and Investment Company either (1) as ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, or (2) as interest paid or accrued within the taxable year on indebtedness.

STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the

trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

(b) *Interest*.—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title.

* * * * *

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General rule*.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses; * * *

STATEMENT

This case involves the deductibility, as an ordinary and necessary business expense or as interest paid on indebtedness, of payments made by respondent in 1931 to the Delaware Realty and Investment Company (hereinafter called "Delaware Company"), pursuant to a contract between them, dated October 25, 1929. The nature of this contract and of the payments made thereunder can be understood only by reference to the extended and somewhat complicated history of their origin.

1. *The nature of the payments made*.—The facts are not in dispute, and may be summarized as follows:

The taxpayer became connected with E. I. du Pont de Nemours and Company (hereinafter called "du Pont Company") in 1890. He was treasurer of the company from 1902 until 1915. In 1915 he was elected president and held that position until 1919. In the latter year he retired as president and was elected Chairman of the Board of Directors, which office he has since continued to hold (R. 157, 209).

At the close of the World War, the executives of the du Pont Company realized that there would have to be a substantial change in its business, which up to that time had been chiefly the manufacture of munitions and war supplies. For this purpose it was decided that a new executive committee composed of nine key men in the company, should be formed to function as the general manager of the company. The members of this new executive committee were appointed in the spring of 1919 (R. 209-210). Shortly thereafter respondent, as Chairman of the Board, recommended to the finance committee of the company that a special committee be appointed to take up the question of proper compensation for the members of this new executive committee (R. 210). The recommendation was adopted and a special committee was appointed which considered a number of plans by which the company might properly compensate the members of the executive committee and at the same time give them such a financial interest in

the business as would bind them to the company (R. 210-211). The plan thought most feasible involved, among other things, the transfer to the committeemen of certain shares of stock in the company at a price agreeable to the committeemen and a loan to them by the company of the money with which to pay for these shares. The plan also contemplated the payment by the company of a bonus to the committeemen at the end of a five-year term of service (R. 211). The company's counsel, however, advised that the company had no power to carry out this arrangement because, under Delaware law, stock could not be issued for future services and stock issued for cash had first to be offered for subscription *pro rata* to existing stockholders (R. 211).¹

In order that the plan would not have to be abandoned because of this difficulty, respondent, at the instance of the du Pont Company, agreed in December 1919 to sell to each member of the executive committee 1,000 shares of common stock at \$320 per share, which was approximately the asset value (R. 17, 213, 215).² Respondent's purpose in enter-

¹ The du Pont Company did not have the requisite number of shares of treasury stock available for sale to the members of the executive committee (R. 211).

² The asset value was below the price at which the stock was then selling on the market, although the market sales were in very small lots (R. 191, 212).

ing into this agreement was not to make a profit out of the specific transactions of sale but rather to conserve and enhance the value of his substantial beneficial stock holdings in the du Pont Company by assuring for the company a stable and efficient management (R. 212-213).

Respondent did not have 9,000 shares of du Pont stock available for delivery to the members of the committee. As a matter of fact, he owned at that time only 74 shares, although he had a reversionary interest in two trusts which he had created and from which he expected to receive back some 24,000 shares of the stock within the next few years. He was also a substantial stockholder in the Christiana Securities Company (hereinafter referred to as "Christiana"), which was the largest single owner of du Pont stock, owning 183,000 shares of a total of 588,542 issued and outstanding (R. 213).

In order to carry out his agreement with the members of the executive committee, respondent arranged with Christiana to lend him 9,000 shares of du Pont stock, the loan to be secured by collateral consisting of 3,800 shares of Christiana stock (R. 47-49, 213-214).² In agreeing to this loan, the directors of Christiana recorded the fact

² Respondent could not have bought 9,000 shares of du Pont stock on the market without greatly increasing the market price. The stock was not then listed on the New York Stock Exchange and the over-the-counter market was very thin (R. 211-212, 214).

that the loan was made, among other reasons, because it was to the benefit of Christiana as the largest stockholder of the du Pont Company to secure the most efficient managerial service for the du Pont Company (R. 47).

The terms of the loan were in substance that respondent would return an equivalent number of shares to Christiana within a ten-year period and in the meantime would pay to Christiana amounts equal to all dividends declared and paid on the shares borrowed (R. 48-49). Respondent did not enter into this agreement for the purpose of making a profit from the loan (R. 214).

The day after respondent made this contract with Christiana, the finance committee of the du Pont Company held a special meeting and authorized the execution by the company of two contracts with each member of the executive committee. One contract provided for the payment to each committeeman of an annual salary of \$30,000, additional compensation based upon a percentage of annual net earnings, a bonus of \$150,000 if the committeeman was still in the company's employ as a member of the executive committee at the end of five years, and the payment by the company for a period of five years of premiums on a \$150,000 life insurance policy. The second contract provided for a five-year loan of \$320,000, bearing interest at the rate of 5 per cent per annum, to be made by the company to each member of the execu-

tive committee for the purpose of enabling him to carry out his agreement to purchase 1,000 shares of du Pont stock from the respondent at \$320 per share (R. 69-73, 214-215). The loan was to be secured by a pledge of the stock to be purchased and by an assignment of the \$150,000 life insurance policy (R. 71-72).

At the end of December 1919 the whole plan was consummated by the execution of the agreements authorized by the finance committee and by the sale and delivery by the respondent to the committeemen of the 9,000 shares of du Pont stock which he had borrowed from Christiana. At the time of the sale, respondent received \$320,000 in cash from each member of the committee, or a total of \$2,880,000 (R. 215).

By the early part of 1921, the value of du Pont stock had materially decreased so that it seemed possible that the committeemen, instead of receiving a benefit from the transaction, would sustain a serious loss (R. 91). When this condition appeared, respondent wrote a letter to each of the committeemen in which he set forth the motives which had prompted him to enter into the transaction in the first instance and disavowed any intention to make a profit for himself. He expressed the view that it was important that the members of the committee should be free of worry over the unexpected outcome of their stock purchase and consequently offered to give to each of them 400 shares

of Christiana stock, having a value of \$400 per share. This stock was to be deposited as additional collateral for the loan from the du Pont Company to the committeemen, subject, however, to the right of respondent to repurchase the stock at \$400 per share at the maturity of the loan. The offer was accepted by each of the committeemen (R. 216-217).

In 1929, at the maturity of the loan from Christiana to respondent, due to stock dividends declared by the du Pont Company during the intervening period and to a split-up of the stock by reduction of its par value, respondent was obligated to return to Christiana 142,212 shares to replace the 9,000 shares which he had borrowed (R. 62-65, 218-219). He did not have this number of shares available for the purpose and therefore arranged for a loan of 142,212 shares from the Delaware Company to discharge his obligation to Christiana. The contract

* We take issue with the recitation by the court below of the facts with respect to this transaction. The court intimated that respondent had to make the loan from the Delaware Company because, at the time of the maturity of his loan from Christiana in 1929, the market for du Pont stock was thin and panicky financial conditions prevailed, preventing respondent from purchasing in the market the requisite number of shares to discharge his obligation (R. 266). The statement that the market for du Pont shares was thin was based on a finding of the District Court relating to conditions in 1919, not to conditions in 1929 (R. 214). And the statement that there was a financial panic is true only of the time at which the loan from Christiana matured, i. e., December 23, 1929. As a matter of fact, respondent made the

which he made with the Delaware Company, dated October 25, 1929, stated that the respondent, "while not at this time contemplating the closing of the short sale transaction of December, 1919," desired to terminate his indebtedness to Christiana (R. 99). Respondent agreed to return the shares borrowed from the Delaware Company within ten years after October 25, 1929, and in the meantime to pay to that company amounts equivalent to all dividends declared by the du Pont Company upon the borrowed shares, together with amounts equal to any tax liability imposed upon the Delaware Company because of the receipt of these sums from the taxpayer which would not have been imposed but for the execution of the agreement (R. 98-103). Respondent did not enter into this agreement with the Delaware Company with the intention or purpose of making a profit thereby (R. 219).

In 1931 respondent paid to the Delaware Company \$567,648, being an amount equal to the dividends paid during 1931 on the shares which he still owed the Delaware Company, and an additional

loan from the Delaware Company on October 25, 1929—two months before the maturity of the Christiana loan and a few days before the stock market crash of October 29, 1929.

We further take issue with the statement of the court below that the Delaware Company was a "wholly alien" company (R. 267). Although respondent was not a stockholder of the company, it was a corporation owned by members of the du Pont family, and its vice president was Irénée du Pont, respondent's brother (R. 103).

* During 1929 the taxpayer returned 300 shares to the Delaware Company, thus reducing his obligation to 141,912 shares (R. 219).

sum of \$80,063.56, which was the amount of the federal income tax imposed upon the Delaware Company by reason of the payments which it had received from respondent (R. 219). These are the expenditures claimed as a deduction in the present case.

2. *The nature of respondent's activities during the years in question.*—During the entire period in question, respondent was Chairman of the Board of Directors of the du Pont Company (R. 209). In 1919 he was also a stockholder and director of General Motors Corporation, Chatham and Phoenix Bank, Philadelphia National Bank, Bankers Trust Company and other corporations (R. 220). He was president of General Motors from 1920 to 1924 and was paid a salary of \$100,000 a year for his services in that capacity (R. 166-168).*

During the years in question respondent maintained offices both in Wilmington, Delaware, and in New York, N. Y., for the conduct of his affairs (R. 221). In 1919 he devoted approximately 50% of his time to his investments, which consisted in large part of du Pont stock. He changed his investments from time to time, but he was not a speculator and had practically no investments in

* Respondent's connection with General Motors was largely for the purpose of promoting the interests of the du Pont Company which was a large stockholder in General Motors (R. 221).

brokerage accounts (R. 220-221). During the year 1931, for example, he made only 11 sales of securities, although these were of substantial amounts (R. 26). According to the findings of the District Court, his "business was primarily that of conserving and enhancing his estate" (R. 221).

3. *Proceedings below.*—In his income tax return for the year 1931 respondent deducted as "Interest Paid" the sum of \$567,648—the amount of the dividends on the borrowed du Pont stock which he paid to the Delaware Company. He did not, in his return, deduct the \$80,063.56 which he paid to the Delaware Company to reimburse it for the federal income tax on the payments received from him, but a deduction for this amount was subsequently claimed (R. 219-220). On audit the Commissioner disallowed both of these deductions and determined a deficiency in tax of \$142,466.79 (R. 220). Respondent paid the tax, duly filed a claim for refund, and, after the lapse of six months, instituted the present suit (R. 208-209).¹

In the District Court respondent urged that the payments to the Delaware Company were deductible on five separate and distinct grounds (R. 226).

¹The declaration sets forth another issue in addition to the issue of the deductibility of the payments to the Delaware Company. The disposition of this other issue was agreed upon by stipulation between the parties which provides that the taxpayer is entitled to a judgment of \$54,439.52 upon the issue settled by the stipulation and will be entitled to judgment in the sum of \$172,351.64 if successful upon the question now before the Court (R. 12-13, 222).

The case was tried by the court without a jury. On February 21, 1938, the District Court filed its findings of fact, conclusions of law and opinion, holding that the payments in question were not deductible (R. 208-243).

Respondent thereupon appealed to the Circuit Court of Appeals for the Third Circuit but confined his appeal to the contention that the payments to the Delaware Company were deductible either (1) as ordinary and necessary expenses paid or incurred in carrying on a trade or business, or (2) as interest paid on indebtedness (R. 253). The court below filed its opinion on March 28, 1939, reversing the judgment of the District Court on the ground that the payments were an ordinary and necessary business expense (R. 264). Having so decided the court below was not called upon, and did not, decide whether respondent was also entitled to deduct the payments as interest paid on indebtedness. However, in his brief in opposition to the granting of a writ of certiorari, the taxpayer stated that, should the writ be granted, both grounds would be urged in this Court in support of the decision of the court below (p. 3). Both contentions will, therefore, be considered in this brief.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that the expenditures were proximately or directly connected with taxpayer's as-

sumed business of conserving and enhancing his estate.

2. In holding that the expenditures were "ordinary" expenses in such business.

3. In refusing to consider the transaction as a whole and take into account the history and purpose of the borrowing of the shares.

4. In holding that the conservation of a taxpayer's estate constitutes a business.

5. In holding that Section 23 (a) of the Revenue Act of 1928 permits the deduction of amounts expended for the purpose of conserving and enhancing the taxpayer's estate.

6. In failing to hold that the sums of \$567,648 and \$80,063.56 were in the nature of capital expenditures which are not deductible from gross income.

7. In reversing the decision of the District Court.

SUMMARY OF ARGUMENT

I

For any one of three reasons respondent is not entitled to a deduction under Section 23 (a) for the payments made to the Delaware company: (A) because respondent's activities in connection with "conserving and enhancing his estate" did not constitute a "business" as that term is used in the statute; (B) because, even if these activities did constitute a business, the payments were not proximately connected with the conduct of that business;

and (C) because, in any event, the payments were not "ordinary and necessary" in character.

A. It is true that the District Court stated in its findings of fact that "The plaintiff's business was primarily that of conserving and enhancing his estate." This statement, however, was not properly a finding of fact but a conclusion of law, since the question of whether there is such a business as "conserving and enhancing" one's own capital is not a question of fact but a matter of statutory construction.

We believe that activities in connection with the prudent investment and reinvestment of one's own capital, as distinguished from the activities of a dealer or trader in securities, can never constitute a "business" within the meaning of Section 23 (a). Practically everyone who has any capital devotes some time and energy to the conservation and enhancement of that capital and to the consideration of the prudence of his investments. In the case of the average investor of moderate means, such investment activity clearly does not constitute a business and its personal character is not changed in the case of a wealthy investor simply because his investments require more time and attention and generate more activity.

The rule established by the court below serves to obliterate the distinction between personal and business expenses. It permits respondents to convert purely personal and capital expenses into ordi-

nary and necessary business expenses by the simple expedient of treating the conservation of his estate as a business and the cost of deferring liquidation of a personal indebtedness as an expense of that business.

B. Even if the conservation and enhancement of respondent's estate were a business, respondent would be entitled to no deduction because the payments in question were not proximately connected with that business. *Kornhauser v. United States*, 276 U. S. 145, 153. It is clear that not every payment which conserves one's estate by deferring liquidation of a personal obligation can be considered as a business expense; the deduction may be had only if the obligation itself was incurred in connection with the conduct of the business.

The obligation pursuant to which the payments here involved were made was incurred in connection with the business of the du Pont Company, not in connection with the business of respondent. This Court has several times pointed out that a stockholder's business must be sharply distinguished from the business of the corporation in which he holds stock. *Dalton v. Bowers*, 287 U. S. 404; *Burnet v. Clark*, 287 U. S. 410. Respondent participated in the transaction at the instance of the du Pont Company and only after the initial proposal that the company itself carry out the plan was found legally objectionable. Although any benefit to the du Pont Company would also result in enhancing the value of respondent's stock in-

terest in the company, this was obviously a secondary consideration. Respondent was the beneficial owner of but 16% of the stock of the company and, had his primary purpose been to enhance his own capital, he would not have entered into a transaction from which 84% of the benefit went to others. Moreover, when, in 1921, he had the opportunity of closing the transaction at a tremendous profit, he did not avail himself of the opportunity but instead made a substantial gift to the members of the executive committee in order to benefit them, and, through them, the business of the company itself.

C. In any event, the expenses were not "ordinary and necessary" in character. It was neither ordinary nor necessary for the conduct of respondent's "business" of conserving and enhancing his estate for him to have incurred a large liability in order to compensate employees of a company in which he held stock. The burden of providing adequate compensation for the members of the executive committee rested upon the company and respondent does not suggest that the company was financially unable to discharge that obligation. The fact that respondent undertook to assume the burden himself cannot change what would have been an ordinary and necessary business expense of the corporation into an ordinary and necessary business expense of one of its stockholders.

Moreover, the liability with respect to which the payments were made had its origin in a short

sale of securities. Respondent was not in the business of making short sales and knew little about them. And, even as a short sale the transaction was out of the ordinary. The usual short sale is a short-term proposition entered into by a trader or speculator in securities in order to derive a profit out of the specific transaction. Here, respondent borrowed the stock for a period of ten years, and at the end of that period borrowed the stock again for another ten years. In borrowing the stock, respondent did not intend to make a profit from its sale but simply to encourage important employees of a company in which he held a 16% stock interest. When, in 1921, he had the opportunity of covering the short sale, and thereby realizing a profit of more than \$1,500,000, he chose to forego his profit and instead to give to the employees Christiana stock worth \$1,440,000.

These circumstances clearly justify the finding of the District Court that the payments "were beyond the norm of general and accepted business practice" and that "the course of conduct evoking them was in fact so extraordinary as to occur in the lives of ordinary businessmen not at all, and . . . in the business life of the plaintiff but once." See *Welch v. Helvering*, 290 U. S. 111.

II

Respondent is likewise not entitled to deduct the payments under Section 23 (b) as "interest paid

* * * on indebtedness." A loan of personal property is not normally regarded as giving rise to an "indebtedness" and payments to the lender equivalent to the return received by the borrower from the property are not normally regarded as "interest" on the loan. To the contrary, the popular import of the word "indebtedness" is an obligation to pay a sum of money, and the popular import of the word "interest" is an obligation to pay for the use of borrowed money. *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 560-561. The rule is established that it is the popular import of the words which controls construction of a tax statute. *Old Colony R. Co. v. Commissioner, supra*, and cases cited.

The payments made by respondent were neither periodical nor fixed in annual amount but were entirely dependent upon the profit or loss which the du Pont Company might enjoy or sustain. They reflected the corporate earnings of the du Pont Company rather than the use value of the property loaned to respondent by the Delaware Company.

Interest is generally charged by a lender in order to secure, for money lent, a return which he would not receive if the money remained idle in his possession. This factor is entirely absent in the present case. The Delaware Company would have been in precisely the same financial position if it had kept the du Pont stock as it was in after it made the loan to respondent. The purpose of the pay-

ments was not to secure to the Delaware Company a return on the property loaned which it would not have secured if it had kept the stock idle in its safe deposit box, but was rather to prevent the Delaware Company from being in any worse position as a result of the transaction.

There is no language in either respondent's contract with Christiana or in his contract with the Delaware Company which refers to the payments as "interest" or which shows any intention of the parties to the contract to regard the payments as interest. Section 23 (b) does not allow a deduction, as interest, of payments which the taxpayer himself did not regard as interest when he contracted to make them and which are not regarded as interest in the normal parlance of the business world.

ARGUMENT

INTRODUCTORY STATEMENT

The sole question involved in this case is whether the payments made by respondent to the Delaware Company fall within the provisions of paragraphs (a) or (b) of Section 23 of the Revenue Act of 1928. In the decision of this question two fundamental principles must be borne in mind: first, that a taxpayer claiming the benefit of a deduction must present a case coming squarely within the terms of the statute allowing the deduction (*New Colonial Co. v. Helvering*, 292 U. S. 435, 440; *White v.*

United States, 305 U. S. 281, 292; *Helvering v. Ind. Life Ins. Co.*, 292 U. S. 371, 381; *Woolford Realty Co. v. Rose*, 286 U. S. 319, 326; and second, that the language of the statute is to be read and construed in its natural and common meaning. *Welch v. Helvering*, 290 U. S. 111, 114; *Old Colony R. Co. v. Commssioner*, 284 U. S. 552, 560; *Woolford Realty Co. v. Rose*, *supra*, p. 327.

Applying these principles to the transaction here under review, we believe it to be demonstrably clear that respondent is not entitled to deduct the payments in question. We propose first to show, that the payments do not come within the provisions of Section 23 (a), allowing a deduction for "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Our position is (1) that respondent's activities in connection with "conserving and enhancing his estate" did not constitute a business as that term is used in the statute, (2) that even if they did constitute a business, the expenses here involved were not paid or incurred in the conduct of that business, and (3) that in any event the payments were not "ordinary and necessary" in character. In the second portion of the brief we propose to show that the payments did not constitute "interest on indebtedness" within the meaning of Section 23 (b).

THE PAYMENTS ARE NOT DEDUCTIBLE AS ORDINARY AND NECESSARY EXPENSES PAID OR INCURRED IN CARRYING ON A TRADE OR BUSINESS.

A. RESPONDENT'S ACTIVITIES IN CONNECTION WITH CONSERVING AND ENHANCING HIS ESTATE DID NOT CONSTITUTE A "TRADE OR BUSINESS"

The findings of the District Court set forth the activities of the taxpayer during the years 1919 to 1931 with reference to the business of the du Pont Company, of General Motors Corporation, and of other corporations in which respondent was a stockholder and director, and also with reference to the handling of his own investments (R. 220-221). These findings conclude with the statement that "The plaintiff's business was primarily that of conserving and enhancing his estate" (R. 221). This statement, although included as a part of the court's findings of fact, is, we believe, properly to be considered as a conclusion of law. The material fact is that a large part of the taxpayer's time and attention was devoted to the handling of his own investments. The question whether activities such as this can ever constitute the carrying on of a "business" within the meaning of Section 23 (a) is, in our view, not a question of fact but of statutory interpretation. The finding of the District Court on this matter, therefore, is entitled to no greater weight than its decision on the other issues of law involved.

The facts with reference to respondent's activities are not in dispute. He was not a trader or speculator. He had practically no investments in brokerage accounts and in 1931, the year for which the deduction is claimed, he made only 11 sales of securities (R. 26, 221). At all material times respondent was Chairman of the Board of the du Pont Company, a position in which he received \$10,000 or \$20,000 a year (R. 168). From 1920 to 1924 he was president of General Motors Corporation, receiving \$100,000 for his services in that capacity (R. 167). He was a director of several large banks and industrial corporations (R. 220). In serving in these capacities he was clearly engaged in business—the business of the various corporations of which he was an officer or director. But the very extent of these business interests serves to negative the assumption that he was engaged in a “business” of “conserving and enhancing his estate” separate and distinct from the business of the corporations in which he had invested and which he served.

A sharp distinction exists between the activities of a trader or dealer in securities, who seeks to make a profit from continuous purchases and sales in the stock market, and the activities of an investor who, though changing his investments from time to time, does so not to make an immediate profit from the specific transactions of purchase and sale but to conserve and enhance the value of his estate by maintaining in his portfolio the type

of securities which he deems best from a long-run investment viewpoint. There is some basis for believing that there is such a "business" as trading or dealing in securities for the immediate profit to be derived from such trading. See *Dart v. Commissioner*, 74 F. (2d) 845 (C. C. A. 4th); *Bedell v. Commissioner*, 30 F. (2d) 622, 624 (C. C. A. 2d); *Sacks v. Commissioner*, 66 F. (2d) 308, 309 (C. C. A. 4th). But we do not believe that mere personal investment activities, no matter how engrossing, can ever properly be characterized as the conduct of a business.

Practically everyone who has any capital devotes some time and energy to the conservation and enhancement of that capital and to consideration of the prudence of his investments. In the normal case, this investment activity is clearly not the conduct of a business and any expense incurred in connection with such activity is not deductible as a business expense. *Kane v. Commissioner*, 100 F. (2d) 382 (C. C. A. 2d); see *Van Wart v. Commissioner*, 295 U. S. 112, 116, and cases cited; *Monell v. Helvering*, 70 F. (2d) 631 (C. C. A. 2d); *Bedell v. Commissioner*, 30 F. (2d) 622, 624 (C. C. A. 2d).*

* In accordance with this general principle, it is established that a commission paid as an incident to an investment transaction is not deductible as an ordinary and necessary business expense. *Hutton v. Commissioner*, 39 F. (2d) 459 (C. C. A. 5th); *Bonwit Teller & Co. v. Commissioner*, 53 F. (2d) 381, 384 (C. C. A. 2d); *Tonningsen v. Commissioner*, 61 F. (2d) 199 (C. C. A. 9th); *Briarcliff Investment Co. v. Commissioner*, 30 B. T. A. 1269.

Such investment expense is rather a personal expenditure, the deduction of which is specifically prohibited by the Revenue Act. Section 24 (a), *supra*, p. 3.

Certainly an active lawyer of moderate means who subscribes to a financial service in order to keep himself informed as to the prudence of his personal investments and as to the desirability of changing his portfolio from time to time, cannot deduct the cost of subscription to this service as an expense incurred in the "business" of conserving and enhancing his estate. His investment activities are personal and the cost of those activities is a personal expense. The activities of the taxpayer here are of precisely the same character as those of the lawyer in the case supposed; the difference is solely one of degree. Respondent, being a man of tremendous wealth, must naturally spend more time than the ordinary person in looking after his personal affairs. The fact that approximately 50% of respondent's time was so spent merely attests the extent of his investment interests. Similarly, the fact that he maintained a staff of employees in two offices to aid him in formulating his investment policy simply means that he believed his stake in prudent investment to be so large as to warrant intensive personal investigation and attention instead of reliance on financial and statistical services or on the advice of brokers.*

* The fact that respondent acted as a director or officer of several corporations of which he was a stockholder is, we

However much time respondent spent on his affairs and however much expense he incurred in handling them, they remained personal activities serving no different economic function in the business world from that served by the personal investment of capital by the ordinary moderate investor. Certainly Congress did not intend to allow a wealthy taxpayer, whose investments necessarily generate more activity, to deduct investment expenses and to prohibit such deductions to the taxpayer of moderate means.

The rule established by the court below serves to obliterate the distinction between personal and business expenses. It permits respondent to convert purely personal and capital expenses into ordinary and necessary business expenses by the simple expedient of treating the conservation of his estate as a business and the cost of deferring liquidation of a personal indebtedness as an expense of the business. Adoption of this rule is not required by any binding authority.¹⁰ We submit that it is

believe, immaterial to the question of whether he was engaged in a "business" of enhancing and conserving his estate. In acting as director, he was engaged in the business of the corporation, not in any business of his own. Insofar as such directorships furnished him with information enabling him to invest more prudently, they fall into the same category as the maintenance of a staff of employees for the same purpose.

¹⁰ There is no decision of this Court directly upon the question. The ruling of the court below is, however, supported by several decisions of other Circuit Courts of Ap-

wrong in principle and so extremely inequitable in its favoritism to the wealthy as to repel the conclusion that it properly reflects the intent of Congress.

B. THE PAYMENTS WERE NOT EXPENSES PAID OR INCURRED IN CARRYING OUT RESPONDENT'S "BUSINESS" OF CONSERVING AND ENHANCING HIS ESTATE

If we are correct in believing that investment activities in connection with conserving and enhancing one's own capital do not constitute a "business," respondent is admittedly entitled to no deduction under Section 23 (a). Even if we are in error as to this, however, respondent is entitled to no deduction under that section unless the expenses were proximately connected with this "business" and unless they were "ordinary and necessary" in character. In our view the payments do not meet either test.

The court below, adopting the District Court's finding that respondent was engaged in the business of conserving and enhancing his estate, held that payments made by him to the Delaware Company were made in connection with that business. The court reasoned that in 1931 respondent had an

peals and of the Board of Tax Appeals. *Kales v. Commissioner*, 101 F. (2d) 35 (C. C. A. 6th); *Miller v. Commissioner*, 102 F. (2d) 476 (C. C. A. 9th); *Foss v. Commissioner*, 75 F. (2d) 326 (C. C. A. 1st); *von Echt v. Commissioner*, 21 B. T. A. 702, 27 B. T. A. 1419; *Kissel v. Commissioner*, 15 B. T. A. 1270. These decisions we believe to be unsound. Looking the other way are the cases cited at p. 24, *supra*.

obligation to the Delaware Company which, regardless of its origin, he had to meet either by return of the borrowed du Pont stock or by making the payments here in question. Return of the stock would have involved serious depletion of his estate; making the payments, on the other hand, conserved the estate by deferring liquidation of the indebtedness. Since the payments served to conserve the estate and since conservation of the estate was respondent's business, the conclusion inevitably followed that the payments were deductible as ordinary and necessary business expenses.

This approach, we submit, is deceptively simple. We believe it elementary that, even if there is such a business as conserving one's estate, every payment on a personal obligation which defers its liquidation and thereby prevents depletion of the estate is not an expense paid or incurred in connection with that business. For example, if respondent had borrowed the du Pont stock from the Delaware Company in order to give it to his friends, or in order to pay gambling debts, or for the satisfaction of some other personal desire, it is plain that the payments here in question would not be deductible as a business expense even though they tended to conserve respondent's capital. Deductibility, therefore, does not depend upon the immediate effect of the payments upon respondent's financial position but rather upon the purpose and history of the obligation pursuant to which the payments were made.

Cl. Menihan v. Commissioner, 79 F. (2d) 304 (C. C. A. 2d), certiorari denied, 296 U. S. 651; *Cripple Creek Coal Co. v. Commissioner*, 63 F. (2d) 829 (C. C. A. 7th).¹¹ In ignoring these factors the court below committed critical error.¹²

The correct approach was, we believe, taken by the Board of Tax Appeals in *du Pont v. Commissioner*, 37 B. T. A. 1198, 1266, a case involving the deductibility of payments made by the respondent to the Delaware Company in 1929 pursuant to precisely the same contract which is here under re-

¹¹ In *Menihan v. Commissioner*, the court rejected the taxpayer's claim that he had suffered a loss because he had made payment, without recourse, upon a liability which at the time of payment was his own liability. The court inquired into the history of the liability and determined that originally the taxpayer had endorsed a corporation note to protect his investment in its stock and that the creditors' adjustment which made the liability his own primary debt without recourse was part of an arrangement which preserved the value of his shares and represented a capital contribution. Similarly in the *Cripple Creek Coal Co.* case the court held that certain payments were not ordinary and necessary expenses since in substance they represented installments in satisfaction of a debt owing to a customer because of its advances toward the cost of a spur track and were therefore a capital investment.

¹² It is well established that component steps of a single transaction are to be viewed as a whole and may not be treated separately for tax purposes. *Commissioner v. Ashland Oil & R. Co.*, 99 F. (2d) 588, 591 (C. C. A. 6th), certiorari denied, 306 U. S. 661; *Starr v. Commissioner*, 82 F. (2d) 964, 968 (C. C. A. 4th), certiorari denied, 298 U. S. 680; *Ahles Realty Corp. v. Commissioner*, 71 F. (2d) 150, 151 (C. C. A. 2d); *Prairie Oil & Gas Co. v. Motter*, 66 F. (2d) 309, 311 (C. C. A. 10th).

view. In holding that the payments were nondeductible the Board stated (p. 1274):

The expense must be paid or incurred in trade or business—petitioner's business—which means that it must be not merely connected in some way with, but must be directly and proximately connected with petitioner's assumed business of an investor, managing investments. *Kornhauser v. United States*, 276 U. S. 145. Merely because he was such investor does not per se make any sort of borrowing of corporate stock in which he invests a part of his business, or make expense in so doing an expense incurred in his business; it might be in a transaction wholly unrelated to his business. It might be, for instance, a part of a transaction of donation to some eleemosynary institution and the basis for deductible contributions—patently without the requisite of proximate and direct business connection. * * * We therefore cannot disregard the setting, the reasons for entering into the transaction for borrowing stock; to do so would leave before us a mere borrowing, isolated from the business which we have assumed petitioner to be carrying on. * * *

Certainly borrowing in one form or another is proximately connected with the conduct of a great many businesses. But in order to determine whether there is such a proximate connection in any particular case it is clearly necessary to inquire into all the facts occasioning the borrowing.

Determination of whether respondent's payments to the Delaware Company were made in carrying on respondent's business as an investor depends, therefore, upon the origin of the liability pursuant to which the payments were made. On principles settled by this Court respondent is entitled to a deduction only if the creation of this liability was a proximate result of or was directly connected with his business. *Kornhauser v. United States*, 276 U. S. 145, 153. It is not enough that the liability was incurred in connection with the business of a corporation in which respondent held stock; respondent may receive the deduction only if the liability was incurred in connection with the conduct of his own business. *Dalton v. Bowers*, 287 U. S. 404; *Burnet v. Clark*, 287 U. S. 410; *Burnet v. Commonwealth Imp. Co.*, 287 U. S. 415; *Van Dyke v. Helvering*, 291 U. S. 642.

In *Burnet v. Clark*, *supra*, this Court held that losses suffered by a majority stockholder and officer, through endorsement of obligations of the corporation, were not losses attributable to the taxpayer's business even though intended to preserve the value of his investment in the capital shares of the corporation. The Court stated (p. 415):

The respondent was employed as an officer of the corporation; the business which he conducted for it was not his own. There were other stockholders. And in no sense can the corporation be regarded as his alter

ego, or agent. He treated it as a separate entity for taxation; made his own personal return and claimed losses through dealings with it. He was not regularly engaged in endorsing notes, or buying and selling corporate securities. The unfortunate endorsements were no part of his ordinary business, but occasional transactions intended to preserve the value of his investment in capital shares.

This decision exemplifies the general principle that expenditures made in the best interests of a corporation and intended to benefit the taxpayer only through his stockholdings in the corporation are capital in nature. They may not be deducted as losses (*Mastin v. Commissioner*, 28 F. (2d) 748 (C. C. A. 8th); *Menihan v. Commissioner*, 79 F. (2d) 304 (C. C. A. 2d), certiorari denied, 296 U. S. 651; *Park v. Commissioner*, 58 F. (2d) 965 (C. C. A. 2d), certiorari denied, 287 U. S. 645), and, under the doctrine of *Burnet v. Clark*, they may not be deducted as business expenses. *Bing v. Helvering*, 76 F. (2d) 941, 942 (C. C. A. 2d).

In *Mastin v. Commissioner*, *supra*, for example, the taxpayer paid for advertising real estate owned by a corporation in which he was a stockholder. The court held that the payment was not a deductible item even though serving to enhance the value of the taxpayer's stock, stating (p. 753):

The payment was therefore made, not by petitioner to advertise his own real estate,

not by the corporation to advertise real estate owned by it, but by petitioner as a voluntary one. It was, in our opinion, a capital expenditure, which might enhance the value of petitioner's stock by increasing the value of the lands of the corporation.

These decisions plainly govern the present case. Respondent's purpose in his entire course of conduct was to secure for the du Pont Company an efficient management (R. 212-213, 215-217, 221, 229). This was obviously the business of the du Pont Company itself. Indeed, respondent's personal participation, at the instance of the company, came only after the initial proposal that the company itself sell shares to the members of the executive committee was found legally objectionable (R. 210-211). It is true that an efficient management for the company would enhance the value of respondent's investment in the company, but this was, of necessity, a secondary consideration. It should be remembered that respondent was the beneficial owner of but 16% of the stock of the company. Had his primary purpose been to enhance the value of his estate, he would obviously not have entered into a transaction from which 84% of the benefit went to others. Moreover, when, in 1921, the price of du Pont stock had decreased to approximately one-half of the price at which respondent had sold it to the committeemen in 1919, he immediately gave to the committeemen shares of Christiana stock of a total value of \$1,440,000

in order to compensate them for any loss from their stock purchases. It can scarcely be claimed that such a gift was made in carrying out respondent's investment business. To the contrary, that gift, like the expenditures here involved, was part of a single plan which, as the District Court found,¹³ was entered into to benefit the business of the corporation and which was not proximately connected with respondent's business of enhancing his investments. *Kornhauser v. United States, supra*; cf. *Kenan v. Bowers*, 50 F. (2d) 112 (C. C. A. 2d).

C. THE PAYMENTS WERE NOT "ORDINARY AND NECESSARY" EXPENSES

Even if respondent's investment activities did constitute a business and even if the payments here in question were paid or incurred in carrying out that business, he is entitled to no deduction under Section 23 (a) unless the payments were "ordinary and necessary" expenses. We believe that they were neither.

¹³ In its opinion, the District Court stated (R. 235):
 " * * * one might bring the payment of funds by the plaintiff one stage closer to the ultimate result sought by him, without rendering such sums deductible. For example, if the plaintiff, out of his own pocket, had increased the pay of chemists employed by the du Pont Company with the hope that by reason of such increase they would work more effectively to improve the processes of the du Pont Company, perhaps thereby increasing the value of the plaintiff's stock, I conceive that it would not be contended that these payments would be deductible by the plaintiff from his gross income under the theory here advanced by him."

It was neither ordinary nor necessary for the conduct of respondent's "business" of conserving and enhancing his estate for him to have incurred a large liability in order to compensate employees of a company in which he held stock. There is no finding of the District Court, and no evidence in the record, that respondent was required to incur this liability in order to conserve and enhance the value of his du Pont stock. The burden of providing adequate compensation for the members of the executive committee rested upon the company and respondent does not suggest that the company was financially unable to discharge that obligation. The fact that respondent undertook to assume the burden himself cannot change what would have been an ordinary and necessary business expense of the corporation into an ordinary and necessary business expense of one of its stockholders. And any contention that it was necessary for respondent to continue the liability, once incurred, is conclusively refuted by the fact that, in 1921, he could have liquidated his obligation at a tremendous profit (see pp. 8-9, *supra*).

Moreover, the liability with respect to which the payments were made had its origin in what was essentially a short sale of securities—a sale of borrowed stock. While short sales are frequently made by dealers or traders in securities, they are not ordinarily made by one whose "business" is simply the conservation and enhancement of his estate. It is conceded in this case that respondent

was not a dealer or trader in securities and did not devote his time to buying and selling stock through brokers as a matter of speculation. The record shows that he did not ordinarily enter into short sales and in fact knew little about them. Under these circumstances, payments made in connection with a short sale cannot be regarded as an ordinary and necessary expense of carrying on respondent's business. *Terbell v. Commissioner*, 71 F. (2d) 1017 (C. C. A. 2d), affirming, *per curiam*, 29 B. T. A. 44.

Even as a short sale, the transaction was obviously out of the ordinary. The usual short sale is a short-term proposition entered into by a trader or speculator in securities in order to make a profit out of the specific transaction. *Cf. Provost v. United States*, 269 U. S. 443. Here, although respondent used the mechanics of a short sale, he borrowed the stock which he sold for a period of ten years and at the end of that period borrowed the stock again for another ten years. In borrowing this stock respondent did not have the intent of making a profit from its sale but simply desired to encourage important employees of a company in which he held a 16% stock interest. When, in 1921, he had the opportunity of covering the short sale and thereby realizing a profit of more than a million and a half dollars, he chose instead to give to the committee Christiana stock worth \$1,440,000. Certainly it is most unusual, and clearly unnecessary, for a stockholder having

but a 16% interest in a corporation, to give to its employees \$1,440,000 and to forego realizing a profit of somewhat more than that, in order to conserve and enhance his investment in the company.

These circumstances seem to us clearly to justify the finding of the District Court (R. 235) that the payments here involved "were beyond the norm of general and accepted business practice," and that "the course of conduct evoking them was in fact so extraordinary as to occur in the lives of ordinary business men not at all, and * * * in the business life of the plaintiff but once."

The decision of the Board of Tax Appeals in the case involving respondent's 1929 payments to the Delaware Company is in accord with the conclusion of the District Court (*du Pont v. Commissioner*, 37 B. T. A. 1198). The Board stated (pp. 1274-1275):

This was no ordinary investment, but an extraordinary situation, which cannot be allocated within the confines of the ordinary business of, or cause an ordinary expense of, an investor managing his investments. Plainly, an investor does not ordinarily find it necessary to encourage the employees or executives of a corporation in which he invests by borrowing and selling to them large amounts of stock for their encouragement. Indeed, the very fact that it was the petitioner, a stockholder, instead of the du Pont Co. itself (which had intended to encourage the executives, but could not constitutionally do so), thus encouraging the executives of

that company, seems sufficient indication that the situation was extraordinary. * * *

We find it unnecessary, in view of this conclusion, to decide whether the expense was necessary.

A somewhat analogous situation was presented to this Court in *Welch v. Helvering*, 290 U. S. 111. There the taxpayer, a former officer of a bankrupt corporation, had made payments on the debts of the corporation after its discharge from bankruptcy in order to strengthen his own business standing and credit. This Court held that although these were business expenses, and perhaps necessary, they were not "ordinary" in character and were therefore not deductible. Mr. Justice Cardoza, speaking for the Court, stated (p. 114):

Men do at times pay the debts of others without legal obligation or the lighter obligation imposed by the usages of trade or by neighborly amenities, but they do not do so ordinarily, not even though the result might be to heighten their reputation for generosity and opulence. Indeed, if language is to be read in its natural and common meaning (citing cases), we should have to say that payment in such circumstances, instead of being ordinary is in a high degree extraordinary. There is nothing ordinary in the stimulus evoking it, and none in the response. * * *

That case controls the decision here. If it is unusual for a man to pay barred debts of a cor-

poration in order to reestablish his credit, it is certainly equally extraordinary for a comparatively small stockholder in a corporation to expend millions of dollars, not to make a profit from the expenditure, but in order to give the executive committee of the corporation an interest in the business.

Dart v. Commissioner, 74 F. (2d) 845 (C. C. A. 4th), upon which respondent relies, is entirely distinguishable. The taxpayers there were engaged in the business of trading in stock on the New York Stock Exchange and in the usual course of that business they made short sales.¹⁴ The holding of the court was merely that expenditures made for the purpose of continuing to hold stock borrowed for short-sale transactions were deductible as ordinary and necessary expenses paid "in order to carry on the business of making 'short sales'." The vital differences between that case and the present one are obvious: the respondent was not engaged in business as a trader or dealer in securities but merely in the "business" of conserving and enhancing his estate; he did not make short sales in the usual course of his business, and in fact knew little about them; and he made the short sale here

¹⁴ The court pointed out (p. 846) that the taxpayers had made hundreds of purchases and sales during the taxable year, that the total selling price of stocks sold during the year by one taxpayer was \$56,945,192.51, and by the other was \$3,456,302.50, and that many of the accounts maintained by the taxpayers were so-called "short" accounts.

involved not to maintain his position in the market but primarily to benefit a corporation in which he held stock. Under all of the authorities above cited, a short sale made under such circumstances is not an ordinary and necessary business transaction.

II

THE PAYMENTS ARE NOT DEDUCTIBLE AS INTEREST PAID ON INDEBTEDNESS

Respondent urges that, even if the payments in question were not ordinary and necessary business expenses deductible under Section 23 (a), they constituted "interest paid * * * on indebtedness" deductible under Section 23 (b). The District Court in the present case (R. 240-241) and the Board of Tax Appeals in respondent's 1929 case (37 B. T. A. at 1272-1273) rejected the contention; it was not considered by the court below. We believe the contention to be wrong in principle and without support in authority.

One does not normally think of a loan of personal property as giving rise to an "indebtedness," nor of payments to the lender equivalent to the return received by the borrower from the property as "interest" on the loan. To the contrary, the popular import of the word "indebtedness" is an obligation to pay a sum of money and the popular import of the word "interest" is the amount one has contracted to pay for the use of borrowed

money." *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 560, 561; *Maryland Casualty Co. v. Omaha Electric L. & P. Co.*, 157 Fed. 514, 519 (C. C. A. 8th); *Title Guaranty & Surety Co. v. Klein*, 178 Fed. 689, 690 (C. C. A. 3rd); *Westerfield v. Rafferty*, 4 F. (2d) 590, 594 (E. D. N. Y.); *Kishi v. Humble Oil and Refining Co.*, 10 F. (2d) 356 (C. C. A. 5th); *Corbett Investment Co. v. Helvering*, 75 F. (2d) 525, 528 (App. D. C.); *City of Lincoln, Neb. v. Ricketts*, 77 F. (2d) 425, 428 (C. C. A. 8th); *Baltimore & O. R. Co. v. Commissioner*, 78 F. (2d) 460, 462-463 (C. C. A. 4th); *The Dry Dock Bank v. The American Life Ins. and Trust Co.*, 3 N. Y. 344, 355; *Hayes v. Commissioner*, 261 Mass. 134; *Fall River Electric Light Co. v. Commissioner*, 23 B. T. A. 168; *New Orleans Land Co. v. Commissioner*, 29 B. T. A. 35; *Terbell v. Commissioner*, 29 B. T. A. 44, affirmed *per curiam*, 71 F. (2d) 1017 (C. C. A. 2d). And the rule is established that it is the popular import of the words which controls construction of a tax statute. *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, 560; *Maillard v. Lawrence*, 16 How. 251, 261; *De Ganay v. Lederer*, 250 U. S. 376, 381.

The decision of this Court in *Old Colony R. Co. v. Commissioner*, *supra*, supplies the guiding prin-

¹⁵ It is worthy of note that the Delaware law regarding "rates of interest" applies only to payments "for the loan or use of money." Delaware Revised Code, 1935, Sec. 2901. 2/0/

ciple. In that case the Court, after stating the fundamental proposition that "The popular or received import of words furnishes the general rule for the interpretation of public laws" (p. 560), continued as follows (pp. 560-561):

* * * as respects "interest," the usual import of the term is the amount which one has contracted to pay for the use of borrowed money. * * * We cannot believe that Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term * * *.

This rule has consistently been followed by the lower federal courts, by the state courts and by the Board of Tax Appeals (see cases cited, p. 41, *supra*). For example, in *New Orleans Land Co. v. Commissioner, supra*, it is stated (pp. 38-39):

We think it follows that if there was no debt, no money withheld, and no obligation to pay money, there was no agreement, contract or obligation to pay interest.

Similarly, in *Fall River Electric Light Co. v. Commissioner, supra*, the Board of Tax Appeals defined interest as follows (p. 171):

Interest on indebtedness has a definite and well accepted meaning as "the compensation allowed by law or fixed by the parties for use, or forbearance, or detention of money."

In his brief in the court below, respondent did not deny that the popular meaning of the words "interest on indebtedness" is compensation paid for the use or forbearance of money; his argument

consisted largely of a discussion of the classical meaning of interest as developed in the old Roman law (Br., pp. 20-23). This discussion concluded with the statement (p. 23) that "the real question is whether we should impute to Congress the intention to substitute the narrower popular meaning for the broader classical usage when inherent reasonableness requires the use of the latter."

The answer to this "real question" is, as we have pointed out, furnished by the decision in *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, where this Court, citing many authorities, held that the language of a tax statute is to be construed in accordance with its popular meaning and not in accordance with any technical—or classical—meaning which might be ascribed to it. The Court aptly quoted from the decision in *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, 370, as follows:

* * * the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

Respondent's statement that "inherent reasonableness" requires construction of the statute to allow the deduction here claimed is based on the theory that the payments to the Delaware Company on the loan of the stock were economically similar to interest paid on an indebtedness and should, therefore, be treated in the same manner

for tax purposes. This economic similarity may be assumed for purposes of the argument but its assumed existence does not alter the character of the payments or bring them within the four corners of the statute. Cf. *New Colonial Co. v. Helvering*, 292 U. S. 435, 440; *White v. United States*, 305 U. S. 281, 292. *Helvering v. Ind. Life Ins. Co.*, 292 U. S. 371, 381; *Woolford Realty Co. v. Rose*, 286 U. S. 319, 326. It is unnecessary to debate the question whether Congress should have provided for the deduction of payments made on a loan of personal property; the fact is that it did not do so. The wisdom of limiting the deduction to "interest paid on indebtedness" is, as the Board of Tax Appeals stated in respondent's 1929 case, "a problem for the legislative body and not for us" (37 B. T. A. at 1279).

The principal authority cited by respondent in his brief in the court below was *Brush-Moore Newspapers, Inc. v. Commissioner*, 37 B. T. A. 787. The case is entirely distinguishable. The taxpayer corporation there, being in financial difficulties and desiring to avoid annual principal payments of \$50,000 on notes which it had given, issued 4,000 shares of its own second preferred stock in exchange for \$400,000 of the notes. The exchange agreement provided that if dividends on this second preferred stock were not paid in any quarter, a fixed amount should be paid as interest, and, in addition, such amount as the directors of the corporation deemed necessary for the support and

maintenance of the payee of the notes or his wife, the payee being guaranteed by the taxpayer against any loss resulting from the exchange. In concluding that "dividends" on this preferred stock were in reality interest payments, the Board referred to prior decisions, and particularly to *Richmond, Fredericksburg & Potomac Railroad Co. v. Commissioner*, 33 B. T. A. 895, affirmed, 90 F. (2d) 971 (C. C. A. 4th), where, in determining that fixed periodical payments made to holders of "guaranteed stock" were in reality interest payments, it stated (pp. 898-899):

It seems to us, however, that in this case the basic test to be applied is whether the stockholder invested his money with the view of receiving a return from its use dependent on the successful operation of the company, on the one hand, or, on the other hand, whether he invested with no regard to the profit or loss which the company might enjoy or sustain, but with a dependence on the regular payment of compensation for the use of the money and an assurance of its ultimate repayment. * * *

In the present case, the payments made by respondent were entirely dependent upon the profit or loss which the du Pont Company might enjoy or sustain. They were neither periodical nor fixed in annual amount and reflected the corporate earnings of the du Pont Company rather than the use value of the property loaned to respondent by the Delaware Company.

Interest is generally charged by a lender in order to secure, on money loaned, a return which he would not receive if the money remained idle in his possession. It is significant that this factor is entirely absent in the present case. The Delaware Company would have been in precisely the same financial position if it had kept the du Pont stock as it was in after it made the loan to respondent. The purpose of the payments was not to secure to the Delaware Company a return on the property loaned which it would not have secured if it had kept the stock idle in its safe-deposit box, but was rather to prevent the Delaware Company from being in any worse position as a result of the transaction. This clearly indicates that the payments here in question, unlike normal interest payments, did not in any real sense constitute compensation for the "use or forbearance" of the subject matter of the loan.

It should be noted that there is no language in either respondent's contract with Christiana or in his contract with the Delaware Company which refers to the payments as "interest" or which shows any intention on the part of the parties to the contract to regard the payments as interest. We submit that it would be inconsistent with the whole philosophy of the tax law to allow a deduction as interest of payments which the taxpayer himself did not regard as interest when he contracted to make them, and which, as we have shown

above, are not regarded as interest in the normal parlance of the business world.

CONCLUSION

The decision of the court below should be reversed.

Respectfully submitted.

✓ ROBERT H. JACKSON,

Solicitor General.

✓ SAMUEL O. CLARK, Jr.,

Assistant Attorney General.

✓ SEWALL KEY,

✓ ROBERT K. MCCONNAUGHEY,

✓ NEWTON K. FOX,

Special Assistants to the Attorney General.

✓ RICHARD H. DEMUTH,

Special Attorney.

NOVEMBER 1939.

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No. 151

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CHARLES LEONORE GROPLEY
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IN THE
Supreme Court of the United States

October Term, 1939

PEARL E. DEPUTY and the SUSSEX TRUST Co., a Corporation
of the State of Delaware, as Administratrix and Ad-
ministrator of the Estate of Willard F. Deputy, De-
ceased, Late Collector of Internal Revenue, *Petitioner.*

v.

PIERRE S. DU PONT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE WHARTON PEPPER,
JAMES S. Y. IVINS,
Attorneys for Respondent.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Argument in Opposition to Granting of the Writ.....	3

CASES CITED.

Bedell v. Commissioner, 30 F. (2d) 622	11
Bonwit Teller & Co. v. Commissioner, 53 F. (2d) 381, 82 A. L. R. 325	11
Central Bank Block Ass'n v. Commissioner, 57 F. (2d) 5	11
Dart v. Commissioner, 74 F. (2d) 845	11, 12
Kales v. Commissioner, 101 F. (2d) 35	9
Kane v. Commissioner, 100 F. (2d) 382	8, 9
Miller v. Commissioner, 102 F. (2d) 476	9
Monell v. Helvering, 70 F. (2d) 631	9
Terbell v. Commissioner, 71 F. (2d) 1017.....	3, 10, 11, 12
Van Wart v. Commissioner, 295 U. S. 112	8

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Opinions Below

The opinion of the District Court (R. 222-243) is re-
ported in 22 F. Supp. 589. The opinions of the Circuit
Court of Appeals (R. 264-268) are reported in 103 F. (2d)
257.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 28, 1939 (R. 268) and the petition for certiorari was filed June 28, 1939. Petitioner invoked the jurisdiction of this Court under section 240(a) of the Judicial Code (U. S. Code, Tit. 28, § 347).

Question Presented

Whether the carrying charges paid by respondent for the forbearance of a loan of borrowed stock were, in the circumstances, deductible from gross income in computing taxable net income as

- (a) ordinary and necessary business expenses, or
- (b) interest upon indebtedness.

Statute Involved

Revenue Act of 1928:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

- (a) *Expenses*.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . .
- (b) All interest paid or accrued within the taxable year on indebtedness, . . .

SEC. 24. ITEMS NOT DEDUCTIBLE.

- (a) *General rule*.—In computing net income no deduction shall in any case be allowed in respect of—
 - (1) Personal, living, or family expenses;

Statement

The statement of facts in the petition (p. 3) is sufficient to reflect the nature of the issues. The respondent contended before the Circuit Court of Appeals that the carrying charges on the borrowed stock were deductible from gross

income either as ordinary and necessary business expenses, or as interest on indebtedness. The Circuit Court of Appeals found it necessary to pass on only the first of these contentions, in which it upheld respondent's position. Should a writ of certiorari be allowed both questions will be before this Court.

Argument in Opposition to Granting of the Writ

Four reasons are advanced in support of the application for certiorari: First, that the decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and with certain decisions of the Circuit Courts of Appeals; second, that the decision sought to be reviewed was erroneous because of too narrow an approach to the question involved; third, that the decision was also erroneous because based upon the assumption (alleged to be unfounded) that "conserving and enhancing one's estate constitutes the carrying on of a trade or business"; and, finally, that the decision below is in conflict with a certain decision of the Circuit Court of Appeals for the Second Circuit, to wit, *Terbell v. Commissioner*, 71 F. (2d) 1017 (1934).

It is respectfully submitted that none of the reasons thus advanced will stand careful analysis and that none of them is sufficient to require the exercise of supervisory jurisdiction by this Court.

I

The contention that the decision of the Circuit Court of Appeals is in conflict with authority will be found on analysis to be based upon the assumed validity of petitioner's second reason. It is nothing more than an assertion by the petitioner that if his interpretation of the facts and law in his second reason were accepted, it would then follow that the decision was in conflict with the authorities cited under his first reason. The converse of this proposition is likewise true: namely, that if the second reason is fallacious, the alleged conflict with authority disappears. Therefore it is upon the second reason that attention must be focused.

II

The consideration of the second reason requires (for the moment) the assumption that respondent was in fact engaged in the business which the District Court made the subject of its thirty-seventh finding of fact as follows: "The plaintiff's business was primarily that of conserving and enhancing his estate." It was upon the basis of this finding of fact that the Circuit Court of Appeals reached the conclusion which is now criticized.

We cannot do better than quote from the concurring opinion of Judge Maris, as follows:

"Section 23 of the Revenue Act of 1928 provides that in computing net income for income tax purposes there shall be allowed as deductions 'all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.' The District Court found as a fact in this case that 'the plaintiff's business was primarily that of conserving and enhancing his estate.' The finding was undoubtedly supported by ample evidence. If we premise this fact, as I think we must, it follows that the plaintiff was entitled, in computing his taxable net income for the year 1931, to deduct all the ordinary expenses paid during that year which were necessary to conserve his estate.

"At the beginning of the year the plaintiff was faced with the fact that he owed the Delaware Realty and Investment Company 141,912 shares of common stock of E. I. du Pont de Nemours & Company. The history of this loan and the purposes for which the stock was borrowed are in my view wholly irrelevant. Whatever the reason, the fact remained that in 1931 he found himself under a binding obligation to the Delaware Company either to return the borrowed stock or to pay an amount equivalent to the dividends on the borrowed shares plus the taxes paid by the Delaware Company by reason of the loan. Since he no longer owned the shares borrowed the return of them would have necessarily involved the depletion of his estate by the amount required to purchase an equivalent number. He elected

to take the only other course which was open to him and paid to the Delaware Company the sum of \$647,711.56, which represented the amount of the dividends paid on the stock plus the taxes of the Delaware Company with respect thereto.

"This payment unquestionably conserved the plaintiff's estate. If it had not been made his invested funds would have faced the certainty of a serious diminution. The necessity of the expense is clear. The diminution of his principal which would have resulted if the payment had not been made would undoubtedly have carried with it an inevitable diminution in taxable income which might well have been substantially equivalent to the deduction here sought. The inherent justice of his claim will thus be seen."

The facts in the case are peculiar; it would be difficult to generalize from the decision thus made or to apply it as a controlling authority to more usual states of fact. The stock-loan which the respondent decided to repay by borrowing the necessary shares from another lender was a loan which had been standing for ten years and serviced by the respondent during all that time. It is a debatable question whether the original borrowing was a step taken in the ordinary course of respondent's business. To the consideration of that debatable question the District Court had given primary attention. For the reasons given by Judge Maris the decision of that debatable question was unnecessary and the complicated facts out of which it arose were irrelevant to the present controversy. It is respectfully suggested that upon this particular record the decision of the Circuit Court of Appeals was sound and that there is nothing in the second reason advanced by the petitioner that requires that it be disturbed. There was an additional reason upon which (had the first point been decided differently) the conclusion reached by the Circuit Court of Appeals might have been based. The price exacted by the lender of the borrowed stock was a certain annual payment of sums equal to dividends and taxes. This, it was con-

tended by the respondent, was a payment of "interest" within the meaning of the Revenue Act. Upon this point the observation of Judge Maris was as follows:

"I am equally satisfied that the expense was an ordinary one within the meaning of the statute. Certainly there is no expense in human experience which is more ordinary than that incurred by a debtor in fulfilling his agreement with his creditors. It is true that this expense usually takes the form of interest. It may well be that the expenditure which the plaintiff made in this case was a payment of interest in the broadest sense. It is certain, however, that it was compensation for the loan of stock which he had made and as such it was an ordinary and usual expense of a transaction of that character."

The District Court had ruled that the carrying charges on the borrowed stock were not deductible as interest, on the theory that "interest" as used in federal taxing statutes means compensation for the use, forbearance or detention of money (R. 241). The only place where we have been able to find a Congressional definition of "interest" is in the Code of the District of Columbia, Title 17, Chap. 1. A reference to the first section of that chapter shows the comprehensive meaning given by Congress to the term "interest."

"The rate of interest in the District upon the loan or forbearance of any money, goods, or things in action, and the rate to be allowed in judgments and decrees, in the absence of express contract as to such rate of interest, shall be six dollars upon one hundred dollars for one year, etc."

Petitioner emphasizes the refusal of the Appellate Court to consider the *motive* of the first loan. When, however, the entire history is taken into consideration there is one significant fact that stands out in bold relief. It is this: that

simultaneously with the first borrowing of stock in 1919 and (according to petitioner's theory) as part of the same transaction, respondent sold the borrowed stock for \$2,880,000. This means that during the life of the loan, down to and including 1931, he had the use of that large sum. In actual and practical effect therefore payments of the carrying charges on the loan were the price paid by the borrower for the use of the money. In view of all the foregoing considerations it is respectfully submitted that neither the second reason nor the first (which is based upon it) affords any justification for the grant of certiorari.

III

As if conscious of the insufficiency of the prior reasons, the petitioner boldly asserts it to be error to assume that "conserving and enhancing one's estate" constitutes the carrying on of a trade or business within the meaning of section 23(a) of the applicable Revenue Act. In order that the third reason advanced may support his contention the petitioner must go so far as to assert that there really is no such business. A narrower contention than this would not be serviceable to the petitioner because if, on any state of facts, such a business can exist, then it must be taken as a fact that it existed in the instant case because the trial court so found and there was unquestionably evidence to support the finding.

It is respectfully submitted that on both reason and authority the conservation and enhancement of a great estate is assuredly a *business* within the meaning of the Act of Congress.

On principle, a citizen so engaged is a producer of taxable wealth. His business is lawfully to increase his income and therefore to produce or create a larger estate. The larger the net estate, the greater his success in his business. His net estate is the excess of his assets over his

liabilities. If he allows his liabilities to increase faster than his assets he is on the way to bankruptcy. To deal with liabilities in an intelligent way is just as much a part of his business as to make advantageous sales and purchases of assets or to take intelligent steps to enhance the value of the assets which he retains. The interest of the federal government coincides with his own: to the extent that the business yields a larger income, a greater income tax is paid; and to the extent that the net estate is increased, the estate tax at death will be proportionately greater.

The authorities (without exception so far as the respondent can find) are unanimous in the recognition of such an activity as a business within the Act of Congress. There are of course cases in which the facts do not justify a finding that the taxpayer in those cases was actually so engaged. The question, however, is primarily one of fact and has been consistently so treated.

Reliance is placed by the petitioner on *Kane v. Commissioner*, 100 F. (2d) 382 (C. C. A. 2d); 1938. "While we do not say," said the Court in that case, "that the taxpayer might not carry on a business through an agent, it was not shown here that enough was done by the taxpayer or her agents to constitute the carrying on of a business." In other words, the question was one of degree and the Court merely held that upon the facts of the *Kane* case the so-called business was non-existent. A reading of the opinion in the *Kane* case is sufficient to show how remote the situation disclosed by the record in the instant case is from the petty transactions which were under consideration in the *Kane* case.

Reliance is also placed by the petitioner upon the decision of this Court in *Van Wart v. Commissioner*, 295 U. S. 112 (1935). The relevancy of this citation is difficult to understand. It was a case of guardian and ward. It was found as a fact that the ward was not engaged in any business and that, so far as appeared, the same thing was true of

the guardian. The guardian's contention was that an attorney's fee was deductible as a necessary business expense, although there was no business in connection with which the service could have been rendered. To state the case is to distinguish it. The same thing may fairly be said of the one remaining authority cited in the petition, *Monell v. Helvering*, 70 F. (2d) 631 (C. C. A. 2d); 1934. In that case the sole beneficiary of an estate agreed to pay an amount equalling one-half of estate tax refunds to be procured by the attorney's activity. The decision was merely that such part of the fee as was attributable to interest on refunds was to be regarded as a payment made to enforce the beneficiary's personal rights and was not deductible from income as an ordinary and necessary expense in carrying on a trade or business. As if in recognition of the fact that the three cases relied upon have been overstrained in an attempt to make them applicable to the instant case, a footnote has been printed at the bottom of page 14 of the petition in which it is conceded that "Other decisions have indicated that investment activity may constitute a business, if it is sufficiently extensive and regular."

Two cases are cited by the petitioner in this connection, one *Kales v. Commissioner*, 101 F. (2d) 35 (C. C. A. 6th); 1939, and the other, *Miller v. Commissioner*, 102 F. (2d) 476 (C. C. A. 9th); 1939. In the former there is a careful opinion by Judge Simons, which reviews all the authorities and reaches the conclusion that the activities of the taxpayer upon the facts of that case were such as to "bring her deductions within the permissible scope of the statute." In the latter, there is similarly a careful opinion by Judge Stephens, who thus states the conclusion of the court: "We think the present case is unlike the *Kales* case, *supra*, and in no substantial manner to be distinguished from the *Kane* case, *supra*." In both cases the Court clearly recognized that the question of the existence or non-existence of a business was to be determined by the facts in each particular case. In the one it was found that such a business ex-

isted; in the other, on the contrary, it was held that the business was non-existent.

When the authorities are reviewed it is impossible to escape the conclusion that there is such a thing as the business of conserving and enhancing an estate within the meaning of the Act of Congress; that the only differences between the decided cases have to do with the facts alleged to be sufficient to constitute a doing of such business and that when, as here, the fact of business has been found by the trial court, the finding should not be disturbed on appeal if the evidence before the Court was sufficient to justify, if not to require, the finding.

IV

The fourth and last reason advanced by the petitioner is an alleged conflict between the decision of the Circuit Court of Appeals for the Third Circuit in the instant case and the decision by the Circuit Court of Appeals for the Second Circuit in *Terbell v. Commissioner*, 71 F. (2d) 1017; 1934. This contention relates exclusively to the original borrowing of stock by the respondent, the details of which were on the peculiar facts of the instant case regarded as irrelevant by the Circuit Court of Appeals. The petitioner's theory is that if the Court ought to have considered the nature of the original borrowing and that if (having so considered it) the Court had decided that the borrowing was part of a transaction involving a "short sale" the decision would have been in conflict with the *Terbell* case. It has already been urged in this brief that the Circuit Court of Appeals in the instant case was right in disregarding the nature of the original loan. If, however, the Court had considered it and had decided that the borrowing was a transaction in line with respondent's business, there would have been no resulting conflict with the decision in the *Terbell* case. That was an appeal from the United States Board of Tax Appeals. The Board was affirmed in a per curiam opinion, which reads thus:

"Affirmed on the authority of *Bonwit, Teller & Co. v. Commissioner*, (C. C. A.) 53 F. (2d) 381, 82 A. L. R. 325; *Bedell v. Commissioner*, (C. C. A.) 30 F. (2d) 622, and *Central Bank Block Ass'n v. Commissioner*, 57 F. (2d) 5 (C. C. A. 5)."

The record before the court in that case presented several questions for decision. When reference is had to the authorities upon which the affirmance was expressly based, it will be found that no one of them deals with the question now under consideration, but with features of the *Terbell* case not present in this one. In the *Bonwit Teller* case the decision was merely that a petitioning taxpayer had failed to discharge the burden of establishing that a brokerage fee paid for negotiating a lease of realty was a deductible expense. In the *Bedell* case the question was whether a taxpayer engaged in the real estate business could deduct as an expense of that business losses sustained by him in connection with the purchase and sale of negotiable securities, which had no relation whatever to the business in which he was in fact engaged. Of course the decision disallowed the deduction. The third and last case underlying the *Terbell* decision (i. e., the *Central Bank* case) was concerned exclusively with the question how much of a single commission paid for negotiating a long-term lease could be deducted as an expense in any one year of the term.

The sound conclusion to reach with respect to the petitioner's fourth reason is that the *Terbell* decision was based upon elements that are absent in the instant case, each one of which had been authoritatively and soundly disposed of in the earlier decisions on which the Circuit Court expressly relied. The Court did not decide against the deductibility of amounts paid to service a loan of stock which had been borrowed to cover a short sale. On the other hand, this was precisely the point which was decided by the Circuit Court of Appeals for the Fourth Circuit in *Dart v. Commissioner*, 74 F. (2d) 845 (1935) and it was there decided in favor of

the deductibility of the payments in question. This was the case which was cited with approval by Judge Maris in the course of his concurring opinion. If the instant case could be thought of as inconsistent with the *Terbell* decision, then the *Dart* case would have been likewise inconsistent with it;¹ but in the *Dart* case the Commissioner did not seek certiorari—presumably because the decision was by him believed to be unassailable.

On the whole, therefore, it is respectfully submitted that no one of the reasons advanced by the petitioner is really sound and that there is no occasion for the review by this Court of the decision of the Circuit Court of Appeals.

GEORGE WHARTON PEPPER,

JAMES S. Y. IVINS,

Attorneys for Respondent.

August 3

....., 1939.

¹ In petitioner's last brief below ["Answer of Appellee to Reply Brief"] he *relied* on the distinction between the *Terbell* and *Dart* cases, showing that in the former there was no evidence that the taxpayer was in business, while in the latter the taxpayer was in the business of buying and selling stocks. No suggestion was made that the *Dart* case was erroneously decided.

BRIEF FOR THE RESPONDENT

PAID
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CHARLES ELMORE CROLEY
CLERK

IN THE
Supreme Court of the United States

October Term, 1939.

No. 151.

PEARL E. DEPUTY and the **SUSSEX TRUST CO.**, a
Corporation of the State of Delaware, as Administratrix
and Administrator of the Estate of Willard F. Deputy,
Deceased, Late Collector of Internal Revenue,

Petitioner,

v.

PIERRE S. du PONT.

BRIEF FOR RESPONDENT.

**On Writ of Certiorari to the United States Circuit Court
of Appeals for the Third Circuit.**

JAMES S. Y. IVINS,
GEORGE WHARTON PEPPER,
Attorneys for Respondent.

INDEX.

	Page.
I. Respondent's Statement of the Questions In- volved	1
II. Concise Abstract of the Facts	2
III. Argument	6
Provisions of Revenue Act of 1928	7
Respondent's Propositions.	
1. The activity of a taxpayer in conserving and enhancing his estate under such cir- cumstances as this record discloses is a "business" within the broad language of the Act of Congress and has long been so recognized in administrative practice and by judicial decision	7
2. The decision to discharge a preexisting loan of stock by borrowing rather than by buying was a mere exercise of judg- ment in the course of the respondent's business; and the cost of "servicing" the new loan was an ordinary and neces- sary expense of that business	10
3. The expenditure necessary to carry the new loan was the price of the lender's forbearance; and the payment of this price was in its nature "interest on in- debtedness" notwithstanding that the subject-matter of the indebtedness was stock and not money	14

INDEX—Continued.

	Page
4. Since the claimed deductions are only carrying charges and not the principal of the loan, it should seem that the nature of the original debt which was discharged by the loan is really unimportant; but if and when it is scrutinized, it will be found to have been in fact a debt incurred to conserve and enhance the respondent's estate	26

APPENDICES.

	Page
I. Authorities on Question Whether Managing Investments Constitutes a Business	1a
II. Cases on Distinction Between Capital Items and Expense Items	8a
III. Authorities on Meaning of "Interest"	14a
Cases	14a
Statutes	22a
The Economists	35a

CASES.

(Page numbers followed by "a" are in Appendix.)

	Page
Appeal of Bettendorf, 3 B. T. A. 378	19a
Austin D. Barney, et al., 36 B. T. A. 446	4a
Baltimore & Ohio Railroad Co. v. Commissioner, 78	
F. (2d) 460	15a, 17a
Bedell v. Commissioner, 30 F. (2d) 622	7a
Bing v. Helvering, 76 F. (2d) 941	9a
Bonwit Teller v. United States, 53 F. (2d) 381	8a
Paul J. Bonwit v. Commissioner, Docket No. 92548 ..	12a
Briarcliff Inv. Co. v. Commissioner, 30 B. T. A. 1269	8a
Burnet v. Clark, 287 U. S. 410 (1932)	12
Burnet v. Clark, 287 U. S. 410	7a
Burnet v. Commonwealth Improvement Company, 287	
U. S. 415 (1932)	13, 28
Cammack v. United States, D. C. Minn., 3d Div. May	
22, 1939	25
City of Lincoln, Neb. v. Ricketts, 77 F. (2d) 425	15a
Commissioner v. Brier Hill Collieries (C. C. A. 6,	
1931), 50 F. (2d) 777	11a
Corbett Investment Co. v. Helvering, 75 F. (2d) 525	16a
Cripple Creek Coal Co. v. Commissioner, 63 F. (2d)	
829	9a
Cunard Coal Co. v. Commissioner, 26 B. T. A. 234	
(1932)	11a
Dalton v. Bowers, 287 U. S. 404 (1932)	12, 28
Dalton v. Bowers, 287 U. S. 404	7a
Dart v. Commissioner, 29 B. T. A. 125	24, 32
Dart v. Commissioner, 74 Fed. (2d) 845 (1935)	25, 33

CASES—Continued.

	Page
Dry Dock Bank v. American Life Insurance etc. Co., 3 N. Y. 344	15a, 16a, 20a
H. R. de Milt Co., 7 B. T. A. 7	26
du Pont v. Commissioner, 37 B. T. A. 1198	4, 31
Henry B. du Pont v. Commissioner, 98 F. (2d) 459 (1938)	19
Fall River Electric Light Co. v. Commissioner, 23 B. T. A. 168	16a
Flint v. Stone Tracy Co., 220 U. S. 106, 171	1a, 7a
George S. Groves, 38 B. T. A. 727	4a
Goldberg v. Commissioner, 36 F. (2d) 551	7a
Hayes v. Commissioner (Mass.) 158 N. E. 539	17a
Helvering v. Winmill, 305 U. S. 79, 83 (1938)	9
Helvering v. Winmill, 305 U. S. 79	4a
Hutchinson Coal Co. v. Commissioner, 24 B. T. A. 973 (1931)	11a
Hutton v. Commissioner, 39 F. (2d) 459	8a
International Shoe Co. v. Commissioner, 38 B. T. A. 81 (1938)	12a
Kales v. Commissioner (C. C. A. 6, January 12, 1939), 101 F. (2d) 35, 38	5a, 7a
Kane v. Commissioner, 100 F. (2d) 382	6a
Karnuth v. United States, 279 U. S. 231, 243	1a
Kenan et al. v. Bowers, 50 F. (2d) 112	6a
Kishi v. Humble Oil & Refining Co., 10 F. (2d) 356	17a
Loudon v. Taxing District of Shelby County, 104 U. S. 771	19a
Marsh Fork Coal Co. v. Commissioner, 11 B. T. A. 685	10a
Marsh Fork Coal Co. v. Lucas (C. C. A. 4, 1930), 42 F. (2d) 83	11a

CASES—Continued.

	Page
Maryland Casualty Co. v. Omaha Electric etc. Co., 157 Fed. 514	17a
Mastin v. Commissioner, 28 F. (2d) 748	9a
Menihan v. Commissioner, 79 F. (2d) 305	9a
Monell v. Helvering, 70 F. (2d) 631	6a
National Lead Co. v. United States, 252 U. S. 140, 145	4a
New Orleans Land Co. v. Commissioner, 29 B. T. A. 35	17a
Old Colony R. R. v. Commissioner, 284 U. S. 552 (1932)	20
Old Colony Railroad Co. v. Commissioner, 284 U. S. 552	16a, 17a
Park v. Commissioner, 58 F. (2d) 965	9a
Preston County Coke Co. v. Commissioner, 24 B. T. A. 646 (1931)	11a
Rainbow Gasoline Corp. v. Commissioner, 31 B. T. A. 1050 (1935)	12a
Redfield v. Ystalyfera Iron Co., 110 U. S. 174	19a
Rogers v. United States, 41 F. (2d) 865	7a
Snyder v. Massachusetts, 291 U. S. 97, 114	14a
Tennessee Consolidated Coal Co. v. Commissioner, 24 B. T. A. 369 (1931)	11a
Terbell v. Commissioner, 29 B. T. A. 44	24, 25
Terbell v. Commissioner, 29 B. T. A. 44	6a, 18a
Title Guaranty & Surety Co. v. Klein, 178 Fed. 689, 15a, 18a, 21a	
Tonningsen v. Commissioner, 61 F. (2d) 199	11a
United States v. Johnston, 124 U. S. 236	4a
United States v. North Carolina, 136 U. S. 211, 216 (1890)	23

CASES—Continued.

	Page
United States v. Roden Coal Co. (C. C. A. 5, 1930), 39	
F. (2d) 425	11a
Van Wart v. Commissioner, 295 U. S. 112	7a
Von Baumbach v. Sargent Land Co., 242 U. S. 503, 515	1a
Welch v. Helvering, 290 U. S. 111 (1933)	13, 14
Welch v. Helvering, 290 U. S. 111	8a
Westerfield v. Rafferty, 4 F. (2d) 590	10a, 18a
West Virginia-Pittsburgh Coal Co. v. Commissioner, 24 B. T. A. 234 (1931)	11a

OTHER AUTHORITIES.

Statutes.

	Page
Code of District of Columbia, Title 17, chap. 1, sec. 1...	22a
Similar statutes in 24 states	23a, 24a
37 Henry VIII c. ix (1545)	24a
21 James I c. xvii (1623)	28a
12 Charles II c. xiii	31a
12 Anne, Stat. II c. 16 (1713)	33a

Economists.

	Page
Bullock, Charles J.: Elements of Economics	38a
Carver, Thomas N.: Principles of Political Economy	40a
Cassel, G.: The Nature and Necessity of Interest	38a
Fraser, L. M.: Economic Thought and Language	41a
North, Sir Dudley: Discourses upon Trade	36a
Say, J. B.: Traité d'Economie Politique	37a
Seligman, E. R. A.: Principles of Economics	40a
Smith, Adam: Wealth of Nations	37a
Taussig, F. W.: Principles of Economics	39a
Turgot, A. R. J.: Sur la Formation et la Distribution des Richesses	36a

IN THE
Supreme Court of the United States.

No. 151. October Term, 1939.

PEARL E. DEPUTY AND THE SUSSEX TRUST CO.,
A CORPORATION OF THE STATE OF DELAWARE, AS ADMIN-
ISTRATRIX AND ADMINISTRATOR OF THE ESTATE OF WIL-
LARD F. DEPUTY, DECEASED, LATE COLLECTOR OF INTER-
NAL REVENUE, PETITIONER,

v.

PIERRE S. DU PONT.

BRIEF FOR RESPONDENT.

I.

**RESPONDENT'S STATEMENT OF THE QUESTIONS
INVOLVED.**

A taxpayer, whose business is that of conserving and enhancing his estate, is indebted to A, a corporate lender, for shares of stock in the X company, borrowed two years previously. The taxpayer, at the time of borrowing the shares, agreed to pay to A, annually, sums equal to dividends declared by X on the borrowed shares and also sums sufficient to indemnify A against any additional tax assessed against A because of the transaction. The sums so received by A are taxable as a part of A's income. Must they also be included in the taxable income of the payor, or may he deduct such sums paid to A from his gross income in the year in which he, in fact, paid them, either as part of the "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" or as "interest paid on indebtedness?"

II.

CONCISE ABSTRACT OF THE FACTS.

Under a contract made in 1919, the respondent du Pont borrowed, with a ten-year maturity, 9,000 shares of stock of the du Pont Company from a concern styled the Christiana Company. As the ten-year period, dating from December 23, 1919, drew to a close, the respondent, on October 25, 1929, entered into an agreement with another corporation, styled Delaware Realty & Investment Company, whereby that Company undertook to lend him the number of shares of the du Pont Company required by him to repay the Christiana loan.

The terms of the respondent's contract with the Delaware Realty Company provided that he would return the du Pont Company stock borrowed from it in kind within ten years after October 25, 1929, would pay to it an amount equivalent to all dividends declared by the du Pont Company upon the shares borrowed, and would reimburse the Delaware Realty Company for all taxes paid by it by reason of the receipt by it from the respondent of the sums equivalent to the dividends declared upon the stock borrowed. In 1931, the taxable year in question, respondent paid to the Delaware Realty Company the sum of \$567,648., being the amount equivalent to the dividends paid by the du Pont Company upon the shares for which he was then indebted. In addition thereto the respondent paid to the Delaware Realty Company the sum of \$80,063.56, which was, in fact, the amount of federal income tax imposed upon the Delaware Realty Company by reason of the payments equivalent to the sum of declared dividends which it had received from the respondent. The total of these two items, \$647,711.56, is the amount of the deduction to

which the respondent claims he is entitled in the suit at bar. If this deduction is allowed, the respondent will be entitled to an affirmance of the judgment in his favor of \$172,351.64, in accordance with the opinion of the Circuit Court of Appeals.

The foregoing summary statement presents all the facts which the Circuit Court of Appeals deemed relevant. If, however, this Court wishes to explore the transaction occurring in 1919 when du Pont originally borrowed stock from the Christiana Company, the following additional statement will be in order.

In December 1919 du Pont was the beneficial owner of 95,139 shares of the stock of the du Pont Company (R. 142, 143). While he was an executive officer of that corporation, his business was primarily that of conserving and enhancing his estate (R. 221, 152-156). The du Pont Company, following the World War, was planning to develop its peace-time manufacturing line and was desirous of tying into its organization through stock ownership nine capable young executives (R. 131-136). After much discussion it was decided by the Company to enable each of the nine to buy 1000 shares of its stock by lending him the purchase price, taking the shares as collateral and applying future dividends in reduction of the loan (R. 148, Ex. K of Stip.). As the 9000 shares required were not otherwise available, respondent agreed to sell 1000 shares to each of the nine at a price determined by a fair appraisalment. Respondent had recently put 24,000 of his shares into two short-term trusts (R. 143, Exs. N, O, P of Stip. R. 75-85). from which he might have reclaimed the 9000 shares by paying to the trustees approximately a fourth of the pur-

chase price receivable from the executors. Instead of doing this, however, he decided to borrow the shares needed to perform his contract with the nine and apply the purchase money to other uses. The Christiana Company, of which du Pont was a large shareholder, was a heavy owner of du Pont shares and agreed to lend him what he needed (R. 48, 49, Ex. D. of Stip.). This loan, thus made to cover a short sale, was to run for ten years, the borrower agreeing to pay to the lender in each year a sum equal to the dividend which Christiana would have received had the loan not been made (R. 48, 49, Ex. D. of Stip.). The transaction was carried through as planned, the sale to the nine was consummated at \$320. per share and the purchase money duly paid to du Pont in cash (R. 16, 17). In making this sale du Pont by borrowing the necessary shares was able to realize \$2,880,000. in cash for immediate use in his business. This he proceeded to turn over through transactions in General Motors stock which ultimately yielded him a great profit. (See record of Board of Tax Appeals in *du Pont v. Commissioner*, 37 B. T. A. 1198, cited on page 30 of petitioner's brief.) In 1921, however, the du Pont stock declined in value from \$320. to \$156. The nine executives were thus caught with a heavy outstanding obligation secured only by greatly impaired collateral. Du Pont came to their relief and turned over to each executive 400 shares of Christiana stock which at that time was worth \$400 a share, to be used as additional collateral, he reserving to himself an option to repurchase which in fact he never exercised. Thereafter all went well. Successive stock dividends declared by the du Pont Company, together with reductions in the par value of its shares, operated to increase the number of shares which respondent was bound

to pay to Christiana. Each year he made the cash payments called for by the contract of loan. When in 1929 the ten-year period was about to expire the number of shares due Christiana had increased to 142,212. Not having at the time sufficient shares at his disposal he borrowed from the Delaware Realty and Investment Company the number which he needed and with them discharged his pre-existing debt. Thereafter the course of events was as set forth in the earlier part of this statement.

III.**ARGUMENT.**

No essential facts are in dispute. The sole purpose of this brief, therefore, is to convince this Court that the judgment below was sound as a matter of law and therefore should not be disturbed.

The reasons supporting this contention may be summarized as follows:

1. There is such a "trade or business" (to quote the language of the applicable statute) as the conservation and enhancement of a taxpayer's estate; and the respondent in this case was in fact busily and successfully engaged in it.

2. The decision to discharge a preexisting loan of stock by borrowing rather than by buying was a mere exercise of judgment in the course of the respondent's business; and the cost of "servicing" the new loan was an ordinary and necessary expense of that business.

3. The expenditure necessary to carry the new loan was the price of the lender's forbearance; and the payment of this price was in its nature "interest on indebtedness" notwithstanding that the subject-matter of the indebtedness was stock and not money.

4. Since the claimed deductions are only carrying charges and not the principal of the loan, it should seem that the nature of the original debt which was discharged by the loan is really unimportant; but if and when it is scrutinized, it will be found to have been in fact a debt incurred to conserve and enhance the respondent's estate.

The applicable provisions of the Revenue Act of 1928 (which was in force during the tax year here in question) are as follows:

"Sec. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income, there shall be allowed as deductions:

"(a) Expenses.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken, or is not taking, title or in which he has no equity.

"(b) Interest.—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title."

With these statutory provisions in mind, the Court is respectfully requested to consider seriatim our reasons for asserting that the judgment below should not be disturbed.

- 1. The activity of a taxpayer in conserving and enhancing his estate under such circumstances as this record discloses is a "business" within the broad language of the Act of Congress and has long been so recognized in administrative practice and by judicial decision.**

As far as *facts* are concerned, this proposition is based on the following findings by the District Court:

"37. The plaintiff's business was primarily that of conserving and enhancing his estate."

Finding No. 36 is, in part, as follows:

"In 1919, the plaintiff maintained an office in Wilmington, Delaware, for the conduct of his business affairs. He had seven or eight employees in his office at that time. In 1920, he established an additional office in New York for the conduct of his business. He has maintained both such offices ever since such years. The expense of maintaining such office was \$36,310.67 in 1931. In 1931, plaintiff sold 63,346 shares of stock in various corporations in which he was a stockholder."

Upon this point Judge Maris, in his concurring opinion, had this to say:

"Section 23 of the Revenue Act of 1928 provides that in computing net income for income tax purposes there shall be allowed as deductions 'all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.' The District Court found as a fact in this case that 'the plaintiff's business was primarily that of conserving and enhancing his estate.' The finding was undoubtedly supported by ample evidence. If we premise this fact, as I think we must, it follows that the plaintiff was entitled, in computing his taxable net income for the year 1931, to deduct all the ordinary expenses paid during that year which were necessary to conserve his estate."

The case was tried in the District Court and argued in the Circuit Court of Appeals upon the theory that there is such a business as conserving and enhancing an estate; and the only question upon this phase of the case argued by counsel or considered by the courts below was whether du Pont was *in fact* engaged in that business. In this Court, for the first time, we are now met with the contention that there is no such business. No decision is cited

by the petitioner which lends color to such a proposition. There are cases which hold that, upon the facts, a particular taxpayer was or was not engaged in the business. All of them are at least impliedly authority that such a business does exist. Indeed, the decisions of the courts and of the Board of Tax Appeals acquiesced in by the Commissioner of Internal Revenue, as well as the rulings of the Treasury Department and the regulations, have consistently for upwards of twenty years recognized that an individual (as well as a corporation) may be engaged in the business of conserving and enhancing his estate. "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received Congressional approval and have the effect of law": *Helvering v. Winmill*, 305 U. S. 79, 83 (1938). In view of these facts, it is to say the least rather startling to hear such a contention now made for the first time. We shall not labor the point here. A thorough historical treatment of it will be found in Appendix I to this brief at page 1a. This demonstrates, we think, that the contention is wholly without merit.

To regard the conservation and enhancement of an estate as a business is, we submit, altogether reasonable. Just as the owner of a farm is undoubtedly in business when he attempts to secure from his acreage a maximum yield, so the owner of securities is engaged in business if he is not content to collect the income on what he already has but is actively engaged in turning over his holdings in an effort to produce two dollars where one existed before. A citizen so engaged is a producer of taxable wealth. His business is lawfully to increase his income and, therefore, to produce

or create a large net estate. The larger the net estate, the greater his success in his business. Particularly from the point of view of government, this is a fair and reasonable conception. The larger the estate which the business man produces the greater the tax which will be payable to government in respect to it, both during life and at death. The expenses of the business of conserving and enhancing it ought therefore in all fairness to be deductible.

2. The decision to discharge a preexisting loan of stock by borrowing rather than by buying was a mere exercise of judgment in the course of the respondent's business; and the cost of "servicing" the new loan was an ordinary and necessary expense of that business.

Upon this point the observation of Judge Maris was as follows:

"At the beginning of the year the plaintiff was faced with the fact that he owed the Delaware Realty and Investment Company 141,912 shares of common stock of E. I. du Pont de Nemours & Company. The history of this loan and the purposes for which the stock was borrowed are in my view wholly irrelevant. Whatever the reason, the fact remained that in 1931 he found himself under a binding obligation to the Delaware Company either to return the borrowed stock or to pay an amount equivalent to the dividends on the borrowed shares plus the taxes paid by the Delaware Company by reason of the loan. Since he no longer owned the shares borrowed, the return of them would have necessarily involved the depletion of his estate by the amount required to purchase an equivalent number. He elected to take the only other course which was open to him and paid to the Delaware Company the sum of \$647,711.56, which represented the amount of the divi-

dends paid on the stock plus the taxes of the Delaware Company with respect thereto. This payment unquestionably conserved the plaintiff's estate. If it had not been made his invested funds would have faced the certainty of a serious diminution. The necessity of the expense is clear. The diminution of his principal which would have resulted if the payment had not been made would undoubtedly have carried with it an inevitable diminution in taxable income which might well have been substantially equivalent to the deduction here sought. The inherent justice of his claim will thus be seen. I am equally satisfied that the expense was an ordinary one within the meaning of the statute. Certainly there is no expense in human experience which is more ordinary than that incurred by a debtor in fulfilling his agreement with his creditors."

The expenses incident to the enhancement of an estate may be described as asset-expenses. Those incident to conserving the estate from loss may be conceived of as liability-expenses. Asset expenses, as we use the term, mean the salaries of bookkeepers and of the clerks who cut coupons and attend to the details of purchase and sale of securities. Liability-expenses mean the salaries of the same bookkeepers and of the clerks who attend to the creation and discharge of liabilities, including taxes, and the sums ordinarily and necessarily paid to lenders by way of interest or other compensation. In point of fact, the deductibility of all these asset-and-liability-expenses is conceded by the Government, *except* that which is the most ordinary and most necessary of all of them, i. e., the exaction by the creditor of the price of the loan. The business man might, conceivably, himself handle his assets without expense, but he cannot do this with his liabilities. He cannot get his creditors to forbear the enforcement of their claims unless

he pays them their stipulated compensation. It is a short-sighted and unreasonable governmental policy which recognizes the business of producing wealth and taxes the wealth when produced, and yet refuses to concede the deduction of the ordinary and necessary expense of preserving the assets from erosion by liabilities. As to the point under consideration (i. e., what are lawfully deductible expenses) the authorities relied upon by the petitioner are analyzed and discussed in Appendices I and II. Four cases in particular appear to be relied upon as the basis of petitioner's argument. All four of these seem to us to deal with questions entirely distinct from the issue in the instant case.

Two of these cases are *Dalton v. Bowers*, 287 U. S. 404 (1932), and *Burnet v. Clark*, 287 U. S. 410 (1932). In the former, the taxable made contributions to the capital of a corporation which he had formed and also voluntarily paid some of its obligations. When the corporation failed, he attempted to deduct the aggregate of these contributions and payments as *losses* incurred in *his* business. There was no suggestion that he was engaged in the business of conserving and enhancing his estate. Mr. Justice McReynolds, speaking for the Court, said (see page 409 at bottom):

"Dalton (the taxable) was not regularly engaged in the business of buying and selling corporate stocks . . . Ownership of all the stock is not enough to show that creation and management of the corporation was part of his ordinary business."

The decision was that the business was not *his*, but the corporation's, that the only business losses were its losses and that his losses were not business losses at all.

In *Burnet v. Clark*, the taxable was merely a stockholder in a corporation and was specifically found *not* to

be in the business of endorsing notes or buying and selling securities. He did, however, endorse the notes of the corporation and sustained losses as the result of selling its stock. He claimed that he was entitled to deduct *as losses* the amounts which he spent to pay the corporate obligations and to meet the liability on account of the stock. Held, that he was not in business at all and, therefore, could not claim deductions for business losses.

In the third case, *Burnet v. Commonwealth Improvement Company*, 287 U. S. 415 (1932), securities had been exchanged between testamentary trustees and a corporation which was, in effect, the incorporated estate of the decedent. On the exchange, the corporation made a gain which was held to be taxable, notwithstanding the substantial identity of the parties to the exchange.

We respectfully submit that we are justified in saying that the foregoing three decisions have nothing to do with the instant case. The facts are different. The deduction, where it was claimed, was claimed on a different ground; and in none of them was the taxable engaged in the business of conserving and enhancing his estate, nor was it shown that he was engaged in any other business.

The fourth case, likewise distinguishable, is *Welch v. Helvering*, 290 U. S. 111 (1933). Here the taxable stood in such a business relation to a corporation that its bankruptcy and consequent failure to satisfy creditors constituted a menace to his personal credit and standing. He, accordingly, paid some of the corporate debts, although he was not liable for them. He attempted to deduct the sums so paid as ordinary and necessary expenses of *his own* business. The deduction was refused on the ground that what he had paid was really a capital outlay, i. e., a sum

paid to purchase goodwill. However "necessary" in a business sense, such a payment was not "ordinary" and, therefore, could not be allowed. To mark the distinction between the *Welch* case and the instant case, it is only necessary to observe that in the former, the taxable was paying debts he did *not* owe, in order to purchase a capital asset, goodwill; whereas here, appellant, by paying carrying charges on an obligation which he *did* owe, paid a current expense of the business in which he was engaged.

We submit not only that the cases relied upon by the petitioner are clearly distinguishable from the instant case but that the nature of the contrast in each instance supplies collateral support to the contention that the origin of the liability upon which respondent paid carrying charges is wholly irrelevant to the deductibility of the expense of carrying the loan which discharged it.

3. The expenditure necessary to carry the new loan was the price of the lender's forbearance; and the payment of this price was in its nature "interest on indebtedness" notwithstanding that the subject-matter of the indebtedness was stock and not money.

"It may well be" said Judge Maris "that the expenditure which the plaintiff (respondent) made in this case was a payment of interest in the broadest sense. It is certain, however, that it was compensation for the loan of stock which he had made and as such it was an ordinary and usual expense of a transaction of that character. *Dart v. Commissioner of Internal Revenue*, 74 F. 2d 845."

The opinion of the Circuit Court of Appeals thus indicated was that the sums claimed as deductions were certainly expense payments and might well be regarded as

interest payments. We submit that whether or not these payments would have been deductible had the statute permitted the deduction of expenses only, they are clearly deductible under the provision of the statute applicable to interest.

It will be remembered that in computing his taxable income for the year 1931, the respondent deducted from gross income, two items of expenditure admittedly made by him in that year.

One was an item of \$567,648. The other was an item of \$80,083. Both these sums were paid by him to a corporation styled the Delaware Realty and Investment Company. Both were included by that corporation in its income tax return, and the appropriate tax thereon was paid to the Federal Government. In other words, the story begins with the collection by the Federal Government of at least one tax on the transaction.

On the theory that the money so received by the corporate taxable was taxed as *interest received by it*, respondent figured that it must also have been *interest paid by him*. He, accordingly, deducted it under that provision of the Revenue Act, which allows a taxable to deduct:

“All interest paid or accrued within the taxable year on indebtedness,”

with an exception not at the moment important. The Bureau of Internal Revenue allowed this deduction for the first eleven taxable years in which it was claimed.

It is, of course, not legally relevant that, unless the deduction thus claimed is allowed, the Federal Government will have received two income taxes on the same income within the same year. Even if this be double or multiple taxation it is not per se illegal. The petitioner's brief mis-

conceives the contention of the respondent on this point. We are mentioning it not as an argument against the legality of the tax in question but merely to overcome the unfavorable presumption which arises if it appears that the transaction in issue would escape taxation altogether if the Government's contention were not sustained. The payments have, in fact, been made and received, and the sum of them has been reflected in the amount of tax paid by the receiver. The only question is whether the payor is likewise to be made taxable with respect to them by a denial to him of the right to deduct them from his gross income.

If a wealthy taxpayer is trying to give to the exempting language of a statute a meaning so broad as to defeat its reasonable operation, a court may properly insist on strict construction and so effectuate the legislative purpose. In the instant case, however, it is not reasonable to suppose that the Congress, for any substantial reason, intended to refuse deduction of interest on a loan of stock while permitting its deduction in the case of a loan of money.

Our first proposition, on this branch of the case, is that the obligation of a borrower to the lender in the case of a loan of stock is an *indebtedness* within the meaning of the Revenue Act.

It is sometimes considered an affectation of learning to refer to the Roman law. But, after all, it, rather than the common law, is the source of our commercial conceptions; and "indebtedness" is, itself a Latin word. It is, therefore, worth noting that according to the general commercial law, the significant distinction is not between loans of money and loans of other things, but between loans which, on the one hand, impose an obligation to return the very thing that is lent, and on the other, those in which

the obligation of the borrower is satisfied by returning an equivalent for the thing lent—whether it be money, or corn, or wine, or oil, or (as in this case) stock. This latter form of loan was the Roman *mutuum*, and such was the precise transaction between the respondent and the Delaware Realty and Investment Company.

The following illuminating quotation from a work of high authority will make this clear:

“Things which are estimated by weight, number or measure, and cannot be used without being consumed, become the property of the borrower, subject to the obligation of returning a like amount identical in kind though not in substance. For as the loan must under these circumstances remain idle, or be employed in a way that precludes the possibility of its being returned in specie, the parties may fairly be presumed to have contemplated the latter alternative. It needs no argument to prove that if I lend my neighbor a hundred dollars, they are as much his as if they were given absolutely; and the resulting duty is not to return the very coins or bank-notes, but as many dollars as will make up the sum.

“It is, therefore, essential to the validity of a *mutuum* that the things lent should be of such a nature that the return of a like quantity will presumably be an equivalent; because the contract would otherwise be an exchange instead of a loan. Money is obviously within this category; and it also includes corn, wine, oil and other articles which are ordinarily sold by count, weight, or measure. But the criterion is not conclusive; and the loan of a book will not be regarded as a *mutuum*, in the absence of an agreement to that effect, although one copy of the edition may be as valuable as any other, because it may be read and returned in the same condition.” (The Law of Contracts by J. I. Clark Hare, p. 73.)

That the obligation of the borrower in such a transaction as above described is strictly an indebtedness is beyond reasonable doubt. Indebtedness is coextensive with obligation; and an obligation covers all cases in which B. is personally bound to A. to render him some thing or service. (Hare, p. 64.)

In the case of a *mutuum* (i. e., a loan to be repaid in kind), the borrower is strictly a debtor and his obligation to repay in kind is uniformly styled a debt in all standard works on Roman law. See, for example, Ledlie's *Sohm's Institutes of Roman Law* (2d Ed.), p. 395.

The scope of the term "indebtedness" has never been narrowed in popular usage. "I am deeply indebted to you," is a familiar form of expression to indicate a sense of obligation to make some suitable return for a kindness shown, a favor done or a service rendered.

It is in the broad sense of obligations unperformed that in the Lord's Prayer, we ask to be forgiven our "debts"; and in the original meaning of "debt" are included obligations *ex delicto* as well as those otherwise arising. (Hare, p. 65.) The Court is also referred to the following definitions taken from Webster's New International Dictionary:

"Debt. 1. That which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another or to perform for his benefit; the thing owed; obligation; liability."

"Indebtedness. 1. State of being indebted. 2. The sum owed; debts, collectively."

These definitions of "indebtedness" as applicable to a "short-sale" of stock are in accord with a recent decision of the Circuit Court of Appeals for the Third Circuit

in *Henry B. du Pont v. Commissioner*, 98 F. (2d) 459 (1938). In that case Judge Biggs adopted the theory advanced by us in the instant case and quoted one of the authorities as follows:

"James Edward Meeker, Economist to the New York Stock Exchange, states in his book 'Short Selling,' 'A short sale may be briefly but comprehensively defined as a sale which creates a debt in terms of goods.' The sales made by the petitioner from April 15, 1930 to November 19, 1932, inclusive, are precisely within the definition given by Meeker."

Assuming, as established by reason and authority, the proposition that the obligation of the respondent to the Delaware Realty and Investment Company is an indebtedness, our second proposition is that the compensation for the loan which the borrower bound himself to pay during its life is "interest" within the meaning of the Revenue Act.

Here, again, it is helpful to return to first principles. Authorities are unanimous to the effect that the obligation of the borrower to restore the equivalent of what he has received may include an obligation to pay compensation for the loan and that this compensation so stipulated for is styled "interest", whether it be compensation for the use of money or for the use of other fungibles. It is of special significance that, according to the Roman law, a separate enforceable contract was necessary to bind the borrower to pay interest on a loan of money, but that in the case of a loan of any other fungibles, the later Roman law treated an informal agreement for the payment of interest, although a mere *nudum pactum*, as sufficient to create a legal duty to pay such interest. (See Sohm, p. 395.) In other words, according to the Roman system, the payment of in-

interest on a debt other than a debt for money was an obligation which might be entered into more lightly and more informally than an obligation to pay interest on a money debt. Irrespective of the subject-matter of the loan, therefore, it is clear beyond reasonable doubt that the classical meaning of "interest" has always included compensation for the use of the thing borrowed.

It is true that the District Court justified its decision to the contrary, by referring to the popular tendency to restrict the classical conception of interest to compensation for the use of money. In so doing, however, we suggest that the learned Court really begged the question at issue. If we are right in insisting that the obligation of the borrower of the stock is properly classified as an indebtedness and that "interest" in its classical sense means the lender's return on every form of indebtedness including this one, then the real question is whether we should impute to the Congress the intention to substitute the narrower popular meaning for the broader classical usage when inherent reasonableness requires the use of the latter.

Strangely enough, the District Court in seeking judicial justification for narrowing the term "interest" as applied to a *mutuum*, cited *Old Colony R. R. v. Commissioner*, 284 U. S. 552 (1932), where, in fact, no such question was in issue. That case was one in which the borrower of (say) \$1,100. had issued an obligation which he could discharge at maturity by paying \$1,000. The obligation specified that the holder was entitled to 5 per cent. interest, or some other named rate; the report does not seem to show exactly what it was. The question in substance was whether the borrower might properly deduct the entire 5 per cent. as interest on indebtedness, or only that fraction of 5 per cent.

(10/11ths) applicable mathematically to the face value of the bond. The obviously sound decision was that in such a case, the Congress doubtless intended to allow the deduction of anything in fact paid as interest on the indebtedness and did not intend to distinguish between par and premium. It is therefore evident that the decision dealt with the scope of "indebtedness" rather than with "interest"—holding that the contract rate should be applied. It is noteworthy, however, that the Supreme Court in that case applied to the interpretation of a deduction the same canon of liberal construction in favor of the taxable which is the general rule in the interpretation of taxing statutes. The Court said: "If there were doubt as to the connotation of the term and another meaning might be adopted, the fact of its use in a tax statute should incline the scale to the construction most favorable to the taxpayer," citing five United States Supreme Court decisions. In that case, as in the case at bar, the taxpayer, in order to arrive at his net taxable income, was attempting to deduct from his gross income an item of interest paid by him.

In addition to the foregoing considerations, it may be questioned whether there is any such uniform popular conception of "interest" as was assumed by the trial court. It is quite common to hear dividends referred to as interest, especially dividends on preferred stock. It is common in New England to speak of "hiring" money, which indicates how close is the popular conception of compensation for the loan of money and compensation for the loan of things which must be specifically returned.

However, we do not need to go so far as to urge that rent paid by a bailee for the use of a tangible chattel would be deductible as interest under the statutory provision. In the case of a bailment, e. g., of an automobile, the bailee is

expected to return to the bailor the identical chattel borrowed and the consideration he gives for the use of the chattel is ordinarily designated as rent. In such a case, the title to the chattel lent remains in the bailor. In the case of a loan of money the situation is quite different. Title to the particular currency lent passes from the lender to the borrower for the very purpose of permitting the borrower to transfer title thereto to others. The very purpose in borrowing money is that the borrower may spend it. The lender knows this in transferring title to the borrower and expects to be repaid with other money of similar value. The loan of stock in the case at bar is exactly similar to the loan of money. The lender of the stock transferred complete title to respondent with full knowledge that it was his purpose forthwith to retransfer that title to others and eventually to repay his debt, not with the same certificates, but with other certificates representing an equivalent number of shares in the same company.

Should respondent default in his obligation to return to the Delaware Realty & Investment Company, 142,212 shares of du Pont common stock at the expiration of the ten-year period, the remedy of the Delaware Company would not be by replevin or bill for the specific performance of the contract, requiring him to procure such shares and deliver them, but by an action for money damages. The lender could either purchase the stock in the open market and hold respondent for the purchase price, or sue him for the market value of the shares. The judgment in either event would be for a sum of money.

Thus, both our present law and the Roman law place the loan of fungible goods, where the specific goods are not to be returned, in a class separate and apart from those

loans where the specific property is to be returned. Historically, the compensation of the lender for all the loans of the first type has been called interest, and there is no basis for now claiming that the word "interest" applies only to loans of money.

All that has been said about compensation for a loan of something other than money is peculiarly applicable to a loan of stock, where the measure of the compensation is the sum of the dividends declared on it and the tax that becomes payable with respect to it. Note the following quotation from Van Leeuwen's Roman Dutch Law, 2d ed., Vol. II p. 55:

"That which is stipulated for the benefit of property or money lent is commonly called *interest* or money-profit (because it generally consists of money); for here, besides the return of the same thing of the like kind and quality, we also stipulate for what we lose through being deprived of the thing or money."

This court has approved a definition of interest equally broad. In *United States v. North Carolina*, 136 U. S. 211, 216 (1890), in an opinion by Mr. Justice Gray appears the following:

"Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation to which the plaintiff is entitled."

In the light of these authorities it is interesting and important to compare the language of the Revenue Act of 1928 with other legislation of Congress dealing with the subject of interest. In Appendix III, B, we have cited the Code of the District of Columbia, Title 17, Chap. 1, Section 1, dealing with the rate of interest in the District of Columbia and have added references to many earlier statutes, both

in the United States and in England, each dealing with the same subject. A study of them seems to us to make it clear that historically the term "interest" is applicable to the price of forbearance on loans of property other than money, and to suggest that as a matter of inherent reasonableness no narrower definition should be given to the term as used in the Revenue Act of 1928. Among other points covered in Appendix III is the distinction between the scope of the terms "interest" and "usury". To the extent that the exaction of usury is either a crime or a ground of forfeiture there are reasons for confining the conception to loans of money which are entirely absent when nothing but the simple conception of interest is under consideration.

The Government makes much of the decision in *Terbell v. Commissioner*, 29 B. T. A. 44. This case was decided by the Board of Tax Appeals before its decision in *Dart v. Commissioner*, 29 B. T. A. 125. It held that the carrying charges on a short sale were not business expenses because it did not appear that the taxpayer was in business. The Board did not seriously consider the interest question, giving on this subject merely the *ipse dixit* "It is clear that the sum of \$22,500. paid to the lender of the stock was not interest *per se*, and the petitioners did not seriously contend that it is." A decision rendered in the absence of serious contention is not ordinarily regarded as authority. A month later the Board decided the *Dart* case (29 B. T. A. 125) without distinguishing the *Terbell* case but relying upon it as authority.

The *Terbell* case went to the Circuit Court of Appeals for the 2d Circuit, which affirmed the Board (71 F. 2d, 1017) in a *per curiam* opinion, citing only three cases, which are related to the question of distinction between capital ex-

penditures and expense items, none of which involved carrying charges.

When the *Dart* case reached the Circuit Court of Appeals the Government relied on the same authorities as in the *Terbell* case. The Court nevertheless reversed the *Dart* case. Now the Government insists that the *Dart* case and the *Terbell* are distinguishable and that the instant case should be assimilated to the *Terbell* case and distinguished from the *Dart* case.

In view of the foregoing considerations, this Court is earnestly urged to treat as unjustifiably narrow any interpretation of "interest" as used in the Revenue Act which limits it to money loans. We submit that the money paid by the respondent to the lender of the stock was, both on principle and authority, money paid as interest and, as such, deductible under the terms of the Act of Congress.

We are not overlooking the fact that the amount of compensation to be paid was not, in this case, predetermined by reference to a specified rate. The importance of a specified rate is merely to supply a definite measure of the lender's claim and the borrower's liability. This clearly appears in cases where one lends money to partners and stipulates for a share of profits as interest on the loan. Nobody will dispute the proposition that if the transaction is clearly one of lending, the receipt of a share of profits is regarded as a receipt of interest; and such participation in profit does not constitute the lender a partner. Both on principle and authority, therefore, that which is in its nature interest will none the less be regarded as interest merely because it is measured by some other standard than a predetermined rate.*

* In *Cammack v. United States*, D. C. Minn., 3d Div. May 22, 1939, P-H ¶ 5453, C. C. H. ¶ 9534, Kreuger & Toll

4. Since the claimed deductions are only carrying charges and not the principal of the loan, it should seem that the nature of the original debt which was discharged by the loan is really unimportant; but if and when it is scrutinized, it will be found to have been in fact a debt incurred to conserve and enhance the respondent's estate.

The facts, in brief, were these:

In the year 1919, respondent being the beneficial owner of 95,139 shares, approximately one-sixth, of the total outstanding common stock of the du Pont Company, had a correspondingly direct interest in conserving and enhancing the value of his holdings. At this time the company's officers decided to establish a more permanent community of interest between the company's shareholders and nine important executives by making it possible for the latter to acquire 1000 shares apiece of the company's stock. The

"American Certificates" carried interest at 5 per cent. plus 1 per cent. for every 1 per cent. paid on ordinary shares in excess of 5 per cent. The Commissioner and the Court treated these certificates as evidences of indebtedness. Could it be doubted that the extra percentage is interest, as much as the fixed 5 per cent.? If so, would the situation be any different if there were no fixed 5 per cent.? Cf. United States savings certificates, sold at a discount from face with the condition that they may be surrendered before maturity with specified increases over sale price, but, if held to maturity, will be paid off with a substantially larger increase over sale price.

Specified times for payment of interest are not necessary. Judgments bear interest until discharged. Debenture bonds accrue interest according to time, but it is only payable when earnings are available. (*H. R. de Milt Co.*, 7 B. T. A. 7.)

A definite time for maturity of principal debt is not necessary—e. g. British "Consols."

company found, however, that there were no shares available for the purpose. It was then that the respondent, perceiving that the proposed step would obviously conserve and enhance the value of his du Pont stock and would put him in possession of a large amount of cash, offered to sell the necessary 9000 shares to the nine executives at their then fair value, which by appraisement was determined to be \$320. per share. This offer was accepted. In order to make delivery under his contract respondent borrowed the shares from the Christiana Company, which company was itself a large holder of shares in the du Pont Company.

At this point we wish to emphasize a distinction (overlooked we think by the petitioner) between the transaction of sale to the executives and the transaction of borrowing stock to cover that sale. The respondent contends that in the former transaction one of his primary motives was to conserve and enhance the value of his heavy holdings of shares in the du Pont Company. As a legal proposition he insists that the presence of this motive gives character to the transaction of sale as a step taken in the course of his personal business. Quite apart from this contention, although wholly consistent with it, is the contention which we earnestly press upon the consideration of the Court that the respondent's ONLY motive in borrowing stock to cover his short sale was a business motive, i. e., his wish to use the entire purchase money in the profit-making ventures in which he forthwith proceeded to embark.

Let us first give our reasons for thinking that the sale to the executives was a step taken by respondent in enhancing and conserving his estate.

The fallacy in the argument to the contrary consists in assuming that because the transaction with the nine

executives was of advantage to the Company, it could not have been a transaction made in the course of the respondent's business. This is a palpable non sequitur.¹ If it was good business for the respondent to incur expense in order to create a community of stock interest between himself and others, it does not cease to be good business for him merely because the du Pont Company was correspondingly benefited. If a taxable engaged in the business of conserving and enhancing his estate were to make a handsome contribution to the Red Cross, he certainly would be permitted to treat it as a charitable gift, although the favorable publicity incident to it might greatly improve his standing and credit. In other words, the immediate and necessary character of a disbursement is not changed (so far as the payor is concerned) merely because by making it he succeeds in killing two birds with one stone.

If respondent *not* being in the business of conserving and enhancing his estate, had been a stockholder in a corporation which got into difficulties and he had made fruitless payments to help it out; and if, on such a state of facts, he had attempted to deduct the amount of these payments as losses, the decision would have been against him because the losses were not incurred in his business but in the business of the corporation. Such would be the effect of the above-cited decisions in the *Dalton* case and the *Burnet* case. Or, if the respondent, being in the business of conserving and enhancing his estate, had voluntarily paid the debts of a corporation bearing his name and had attempted to treat such payments as expenses currently incurred in the course of his own business, he would have been met with the decision in the *Welch* case, to the effect that money

¹ Cf. *Bonwit v. Commissioner*, Appendix II, p. 8a.

thus spent to purchase goodwill is not an ordinary expense and is, in any event, a capital outlay.

Or let it be supposed that the respondent had had no interest whatever in the du Pont Company, but had a very real and friendly interest in each of the nine young men in the employ of that corporation. Suppose, further, that to promote their welfare, he had generously made an expenditure in order that they might make advantageous purchases of the Company's stock. These payments certainly would not have tended to conserve or enhance his estate. They would have tended to conserve and enhance the business of the Company, but this circumstance would have given him no right to deduct them. We respectfully submit that the same conclusion as would be reached in this supposititious case cannot possibly be justified upon the facts of the actual case, unless a definition of conservation and enhancement is to be adopted so narrow and unreasonable as to be purely arbitrary.

Nor is the Government helped by the circumstance that when the fall in value of du Pont stock threatened to discourage the nine executives instead of to stimulate their interest, respondent voluntarily indemnified them against resulting loss while making it possible for them also to secure an enhanced profit. The business significance of this transaction is obvious. It was the act of a large-minded and far-seeing business man, who was willing to make a very heavy payment to prevent the failure of a plan in which he had already invested a large sum of money. He is not contending that the value of the shares of Christiana stock given by him to the nine executives to protect them against loss incident to the shrinkage of du Pont stock was deductible as an ordinary expense of his business, although it was in fact an expenditure made to retain the

interest and goodwill of the nine employees for his own pecuniary benefit rather than have it turn into ill-will, as might have been the case if their great expectations had been turned into disappointment.

In contrast to these supposititious cases we submit that what the respondent in the instant case actually did was to make a sale of some of his shares of du Pont stock for the sake of conserving and enhancing the value of the many thousand shares of the same stock of which he continued to be the beneficial owner. We urge that the presence of this motive is an irresistible inference from the facts and is quite sufficient to mark the transaction as an excellent piece of business.

If, however, it be assumed (but only for the sake of the argument) that the transaction of sale was not a transaction in the course of respondent's business, we press upon the consideration of the Court the second of the two contentions above referred to, namely, that the decision to borrow stock to cover the sale instead of using other available shares for that purpose was a decision that could have been dictated by no other motive than a desire to make a business profit out of another use of the entire purchase money yielded by the sale.

At that time the respondent was the beneficial owner of 24,000 shares of du Pont stock which had been placed temporarily in two trusts in order to provide funds for building schools and a hospital (Exs. N, O, P;—R. pp. 75-90). Ten thousand of these shares were available to the respondent at any time upon payment of not to exceed \$600,000. (Exs. N, O;—R. pp. 75-84) cash to the trustee for their release. These shares and 14,000 other like shares were also available to the respondent by substitution of other securi-

ties for the purposes of the trust. It was asserted below, and no doubt will be argued by the petitioner here, that this transaction with the nine executives was not entered into for the purposes of profit. There is a finding of fact to this effect (No. 17). But this merely means that the respondent contemplated no profit at the expense of the executives. The fact just stated that for an expenditure of \$600,000. (less than one-fourth of the purchase money received from the executives) he could have redeemed his own shares and delivered them under his contract is sufficient evidence that there was in fact a profit-motive in borrowing the stock from Christiana instead of acquiring it with the money he received. That this is not mere matter of inference appears from a reference to a case several times cited in the petitioner's brief, namely, *du Pont v. Commissioner*, 37 B. T. A. 1198.


On page 30 of petitioner's brief will be found the following quotation from the opinion in the case so cited:

"We therefore cannot disregard the setting, the reasons for entering into the transaction for borrowing stock; to do so would leave before us a mere borrowing, isolated from the business which we have assumed petitioner to be carrying on. . . ."

It appears from du Pont's income tax return for 1929 (Ex. R-139 in the cited case—Vol. 4 p. 274 of the record in No. 7044, C. C. A. 3; Oct. term 1939) that he was a heavy buyer of General Motors stock during the year 1921; and it further appears that in the year 1929 the taxable sales of that stock produced to the respondent a profit of \$36,807,161.73, a transaction which resulted in a tax, duly paid, of approximately \$4,500,000. In the light of these

inescapable facts it requires something like temerity to argue that the decision to borrow du Pont stock and then to sell it for its fair value in cash was merely a philanthropic transaction wholly devoid of the profit motive.

The contract of borrowing, which was to run for ten years, called for the periodic payment by respondent to the lender of amounts equal to the dividends declared on the borrowed shares. These sums he regularly paid. As and when received by Christiana, they were taxable as part of that company's income and, year after year, he deducted them from his gross income in making his personal Income Tax returns. The deduction by the respondent of these annual payments equal to the dividends declared on the borrowed shares was allowed by the Government for eleven taxable years, until the Board of Tax Appeals, in 1933, decided *Dart v. Commissioner*, 29 B. T. A. 125. The Board held that a person engaged in a business of buying and selling securities, who sold certain stock "short" through brokers, might not deduct as ordinary and necessary expenses, charges in his account made by the brokers for dividends paid by them on certificates which they had borrowed for delivery to the purchaser. The Board of Tax Appeals treated the amount of these dividends as a capital expenditure which entered into the cost of the stock and should be included in the cost to determine the profit or loss on the short sale. If the *Dart* case and the present case were analogous, and if the decision in the *Dart* case had been correct, the conclusion of the Government, with respect to the respondent's 1931 tax return, would also have been correct. The Government, specifically in reliance upon that decision (R., p. 165) announced a change in its policy and declined to permit the respondent to make, in his 1931 tax return, deductions similar to those



allowed in earlier years. In point of fact, however, *Dart* appealed, and in *Dart v. Commissioner*, 74 Fed. (2d) 845 (1935), the Circuit Court of Appeals for the Fourth Circuit reversed the Board of Tax Appeals and held that such dividends constituted ordinary and necessary expenses. The Government did not appeal from this decision. It, accordingly, appears to be clear that if the Circuit Court of Appeals for the Fourth Circuit had been called upon to decide the instant case, the deductions now claimed by the respondent would unquestionably have been approved, unless that Court were to give less favorable treatment to one diligently engaged, as is the respondent, in enhancing his estate by sound business methods, than was given in the *Dart* case to one who was engaged in speculation, as a side issue to his tobacco business.

In the foregoing discussion we have assumed that this Court will regard the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Dart* case as sound. If, however, the Court regards that decision as for any reason questionable, we respectfully refer to Appendix II to this brief. We have there discussed with care the principles which seem to us to distinguish expense items from capital outlay and to vindicate the soundness of the decision in question. In spite of the petitioner's attempt to distinguish the *Dart* case, we submit that it is a clear authority for the proposition that the carrying charges sought to be deducted in the instant case are items of expense and as such are deductible under the statute.

Conclusion.

There is such a "trade" or "business" as the conservation and enhancement of a taxpayer's estate; and, as the trial court expressly found, the respondent was primarily

engaged in it. No serious contention to the contrary can be made. The deductions claimed by the respondent were properly allowed by the Circuit Court of Appeals upon the ground that they were items of current business expense. They might equally well be allowed upon the additional and consistent ground that they were payments by way of interest on indebtedness paid and accrued within the taxable year. It follows that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

JAMES S. Y. IVINS,
GEORGE WHARTON PEPPER.

APPENDIX I

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APPENDIX I.

AUTHORITIES ON QUESTION WHETHER MANAGING INVESTMENTS CONSTITUTES A BUSINESS.

In *Flint v. Stone Tracy Co.*, 220 U. S. 106, 171, the Supreme Court adopted the definition from Black's Law Dictionary, "'Business' is a very comprehensive term and embraces everything about which a person can be employed", and also the definition from Bouvier's Law Dictionary, "'That which occupies the time, attention, and labor of men for the purpose of a livelihood or profit'".

In *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 515, the Court referred back to *Flint v. Stone Tracy Co.*, and said:

it became necessary to inquire what it was to do business, and this court adopted with approval the definition judicially approved in other cases, which included within the comprehensive term "business" "that which occupies the time, attention, and labor of men for the purpose of a livelihood or profit."

In *Karnuth v. United States*, 279 U. S. 231, 243, the Court said:

The word is one of flexibility; and, when used in a statute, its meaning depends upon the context or upon the purposes of the legislation.

The provision for deduction of ordinary and necessary business expenses contained in section 23 (a) of the Revenue Act of 1928 and subsequent Revenue Acts, was the same as the provision in prior Revenue Acts back to that of 1918.

The Treasury Department has been consistent in its rulings that the management of investments, if occupying a substantial amount of the taxpayer's time, constitutes a business, and that the expenses of such management are deductible from gross income. In 1921 the Treasury Department published Office Decision 877, 4 C. B. 123, which reads as follows:

A taxpayer whose income is derived principally from investments in stocks and bonds may deduct as a business expense the rent of an office and the cost of clerical help if he can show in his return that such expense is ordinary and necessary within the meaning of section 214 (a) 1 of the Revenue Act of 1918.

There was no departure from this ruling between 1921 and 1934, when I. T. 2751, XIII-1 C. B. 43, was published, which reads as follows:

Revenue Acts of 1918, 1921, 1924, 1926, 1928, and 1932.

The ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection, and conservation of properties producing taxable income are deductible from gross income.

The question has been presented as to the deductibility of fees and expenses paid in connection with the management, protection, and conservation of various income-producing properties.

The Revenue Acts have consistently provided for the deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." (Section 23 (a), Revenue Acts of 1932 and 1928, and section 214 (a) 1, Revenue Acts of 1926, 1924, 1921, and 1918.) This provision of law has been liberally construed as disclosed by the following decisions:

In Office Decision 877 (C. B. 4, 123) it was held that a taxpayer whose income is derived principally from investments in stocks and bonds may deduct as business expenses the rent of an office and the cost of clerical help if he can show that such expenses are ordinary and necessary.

Fees, commissions, and other compensation of committees for incompetent persons, as well as expenses properly incurred by such committees, have been held to be allowable deductions for income tax purposes if paid or incurred with respect to the management or conservation of income-producing property or funds belonging to the incompetent or with respect to the collection or securing of any income inuring to such incompetent. (I. T. 2238, C. B. IV-2, 49.) It has also been held that if a safety deposit box is used primarily in connection with the safeguarding of income-producing securities, the rent paid therefor constitutes a deductible business expense. (I. T. 2579, C. B. X-2, 129.)

The Board of Tax Appeals has consistently held that expenses paid or incurred in preserving an estate, making sales and collections, and doing other things necessary for the maintenance of the estate and the production of income, are ordinary and necessary expenses, and therefore proper deductions in computing net income. (*Appeal of Grace M. Knox et al.*, 3 B. T. A. 143, C. B. X-2, 39; *Appeal of William W. Mead et al.*, *Exs.*, 6 B. T. A., 752, C. B. X-2, 47; *Appeal of H. Alfred Hansen, Ex.*, 6 B. T. A., 860, C. B. X-2, 29; *Henrietta Bendheim v. Commissioner*, 8 B. T. A., 158, C. B. X-2, 6; *George W. Seligman, Ex., v. Commissioner*, 10 B. T. A., 840, C. B. X-2, 64.)

In the case of *Kenan et al. v. Bowers* (48 Fed. (2d), 263), the court held that compensation for clerk hire and rent of a safe in connection with the taxpayer's income-producing property were deductible.

The foregoing decisions indicate an obvious intent to allow as deductions all the ordinary and necessary expenses paid or incurred in the production of taxable income. This principle rests upon the sound basis that business expenses represent the cost of producing income.

In view of the foregoing, it is held that all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection, and conservation of properties producing taxable income should be allowed as deductions in computing net income. In this connection care should be taken to distinguish expenditures of a capital or personal nature. This conclusion should not be extended to net loss cases, which are governed by different sections of the Acts and apply only to losses incurred in a trade or business regularly carried on by the taxpayer.

The Commissioner of Internal Revenue published acquiescences not only in the Board decisions enumerated in I. T. 2751, above, but in subsequent decisions of the Board of Tax Appeals similarly holding that expenses incurred in preserving an estate are deductible. For example, in 1939 (I. R. B. 1939-1-9655), the Commissioner acquiesced in the Board's decision in *Austin D. Barney, et al.*, 36 B. T. A. 446, and later in 1939 (I. R. B. 1939-4-9683) the Commissioner acquiesced in the Board's decision in *George S. Groves v. Commissioner*, 38 B. T. A. 727.

The long continued departmental construction would of itself justify the courts in following the rulings of the Treasury Department. *United States v. Johnston*, 124 U. S. 236.

When coupled with re-enactment of the statute in similar terms, the departmental construction is regarded as adopted by Congress. *National Lead Co. v. United States*, 252 U. S. 140, 145; *Helvering v. Winmill*, 305 U. S.

79. A recent case involving this very construction of this same section of the statute is *Kales v. Commissioner* (C. C. A. 6, January 12, 1939), 101 F. (2d) 35, 38, where the court said:

It has long been a recognized rule of statutory construction that the re-enactment of a statute by Congress in identical terms and failures to amend it in the face of consistent judicial and administrative construction is persuasive of a legislative recognition and approval of the statute as thus construed. *Brewster v. Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457; *Helvering v. Bliss*, 293 U. S. 144, 151, 55 S. Ct. 17, 79 L. Ed. 246, 97 A. L. R. 207. A long series of Treasury decisions were promulgated before the passage of the 1928 Act defining "business" with substantially the breadth given to it in *Flint v. Tracy Stone Co.*, supra, yet § 23 of that Act re-enacted similar provisions of § 214 of the Acts of 1918, 1921, 1924 and 1926, 40 Stat. 1066, 42 Stat. 239, 43 Stat. 269, 44 Stat. 26. More important still is the fact that while the *Kissel Case* was decided by the Board of Tax Appeals in 1929, and the *von Echt Case* upon rehearing in 1932, § 23 (a) was retained without change in the 1932, 1934 and 1936 Acts, 26 U. S. C. A. § 23. We are asked by respondent's counsel to view the conflict between the Board's decision in the instant case and those in the *Kissel*, *von Echt* and other cases as merely indicating "some inconsistency and vacillation" rather than as departure from a hitherto consistently maintained construction. But that the respondent finally acquiesced in the rule of the *von Echt* and *Kissel Cases* is indicated by the lack of any citation on appeal, and in the formal response of the Bureau to the inquiry of the Committee of Banking Institutions on Taxation (reported in *Standard Federal Tax Service* 1934, Vol. 3, § 6035) in which it was said: "You direct attention to the reconsideration by the United States Board of Tax Appeals of the case of *Alice P. Bachofen von Echt v. Commis-*

sioner, 21 B. T. A. 702, reference to which is made in the letter addressed to you on August 19th, 1933. You are advised that the Bureau has recently adopted the policy of allowing as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year with respect to the management, protection and handling of properties producing taxable income." The situation here outlined calls for the application of the rule of *Brewster v. Gage*, *supra*.

Although the last published Treasury ruling—I. T. 2751, set forth above, p. 2a, stands unrevoked and is broad enough to cover all cases where expenses are incurred in the management, protection and conservation of properties producing taxable income, the Bureau of Internal Revenue has nevertheless contested deductions in a number of cases where the taxpayer was said to be a "mere passive investor" not being sufficiently active in his affairs to justify calling his managerial efforts a business. In a number of these cases, the courts and the Board of Tax Appeals have held that, on the particular facts, they did not regard the taxpayer as carrying on a business and have denied the deductions on that ground. The cases cited by the Government in support of its proposition that (contrary to the finding of fact of the District Court) Mr. du Pont's efforts, occupying 50 per cent of his time, in the management and conservation of his investments did not constitute a business, are cases of this type.¹ In the opinions in most of them the courts recognized that the conservation and management of investments *may* constitute a business but dis-

¹ *Van Wart v. Commissioner*, 295 U. S. 112; *Monell v. Helvering*, 70 F. (2d) 631; *Kane v. Commissioner*, 100 F. (2d) 382; *Kenan v. Bowers*, 50 F. (2d) 112. As to *Bedell v. Commissioner*, 30 F. (2d) 622, see p. 7a below. As to *Terbell v. Commissioner*, 29 B. T. A. 44, see p. 24 above.

tinguished the cases before them on their particular facts. Many of the cases cited by the Government are distinguished in *Kales v. Commissioner, supra*. If the Government had regarded the *Kales* case as in conflict with these other decisions, it would undoubtedly have applied to the Supreme Court for certiorari, but shortly after the decision of the Circuit Court of Appeals in the *Kales* case the Solicitor General announced that no such petition would be filed.

Under the Revenue Acts of 1918 and 1921 (§ 204) and the Revenue Act of 1924 (§ 206) individual taxpayers were allowed to carry forward from one year to the next net losses incurred in "business regularly carried on by the taxpayers". In applying these provisions of the statute the courts narrowed the definitions of "business" given in such cases as *Flint v. Stone Tracy Co.*, and held that everything that constituted a business did not necessarily constitute a business *regularly carried on*. Accordingly, the net loss carry-over was denied to taxpayers in a number of cases where the business consisted of occasional or isolated transactions. The Government has cited a number of these cases,² but obviously they are not authority for the construction of a statute which omits the word "regularly".

² *Bedell v. Commissioner*, 30 F. (2d) 622; *Dalton v. Bowers*, 287 U. S. 404; *Burnet v. Clark*, 287 U. S. 410; *Goldberg v. Commissioner*, 36 F. (2d) 551; *Rogers v. United States*, 41 F. (2d) 865.

APPENDIX II

THE DISTINCTION BETWEEN CAPITAL AND EXPENSES

APPENDIX II

APPENDIX II.

CASES ON DISTINCTION BETWEEN CAPITAL ITEMS AND EXPENSE ITEMS.

Many of the cases cited in the Government's brief denied deductions as business expense on the ground that items involved were capital items representing expenditures or investments, the benefits of which would accrue to the advantage of the taxpayer for several or many years. The tribunals held that such disbursements belonged in capital account and not in expense account. Those of them which were of a wasting nature were allowed to be recovered by way of exhaustion or depreciation over a period of years. These cases cited by the Government¹ are not applicable to carrying charges, which do not constitute an investment but merely the consideration paid for forbearance in order to postpone payment for an investment.

A number of cases are cited by the Government where a stockholder paid out money to discharge the debts or other obligations of a corporation, for the betterment of his investment in the stock. The courts held that he could not deduct these items as losses or business expense because they were not *his* losses, nor expenses of *his* business—but *they all indicated that the expenditures were in the nature of capital investments on his part, as tending to increase the value of his stock holdings.* In this they were like the

¹ *Bonwit Teller v. United States*, 53 F. (2d) 381; *Briarcliff Inv. Co. v. Commissioner*, 30 B. T. A. 1269; *Welch v. Helvering*, 290 U. S. 111; *Hutton v. Commissioner*, 39 F. (2d) 459; *Tonningsen v. Commissioner*, 61 F. (2d) 199.

Christiana stock given by Mr. du Pont to the nine executives in 1921—which he never claimed as an expense. None of the Government's authorities involved *carrying charges*, which are amounts paid out to others for the use of assets which belong in capital account.

The great fallacy in the Government's brief is that it fails to distinguish between capital items and expense items. An investment by which one acquires capital in the hope of deriving gain by way of income or increment, is a capital item,² even though payment therefor may be made in installments. Its cost is not deductible currently but must be recovered either over the life of the asset, through depletion, depreciation, obsolescence or exhaustion allowances, or not recovered until the asset is disposed of, when gain or loss on the purchase transaction is computed.

On the other hand, an expenditure which adds nothing to the value of the taxpayer's capital but merely enables him to use his capital or hold it for future sale, is an expense item which should be charged against annual income and which it is proper to capitalize. In this category are rent, insurance premiums, interest on borrowed capital, annual taxes and other items commonly called carrying charges. A speculator who buys a single parcel of unimproved real estate and holds it for a number of years awaiting the growth of the "unearned increment," may have to pay out during his waiting period taxes and interest in very substantial proportion to the original investment. Often he would prefer to lump these "carrying charges" in with the cost price and have them go to reduce his profit on the sale of the

²E. g. in *Menihan v. Commissioner*, 79 F. (2d) 305; *Cripple Creek Coal Co. v. Commissioner*, 63 F. (2d) 829; *Mastin v. Commissioner*, 28 F. (2d) 748; *Park v. Commissioner*, 58 F. (2d) 965; *Bing v. Helvering*, 76 F. (2d) 941.

land rather than deduct them annually (sometimes in years in which he had no income), but the Treasury Department has established that this is not permissible. On this point it prevailed in the case of *Westerfield v. Rafferty*, 4 F. (2d) 590, and regarded the decision of such importance that it published it as a Treasury Decision, giving it the force and effect of a Regulation (T. D. 3667, IV-1 C. B. 96).³

The difference between capital charges and items which go merely to maintain the *status quo*, and are thus chargeable to expense, is well exemplified in the case of coal mines. In Treasury Regulations 74, relating to the income tax under the Revenue Act of 1928, Article 242 (b) provided:

Expenditures for plant and equipment not including expenditures for maintenance and for ordinary and necessary repairs, shall be charged to capital account recoverable through depreciation.

Coal mining companies contended that expenditures for electric locomotives, mine cars, rails, etc., made necessary to maintain output, by removal of coal and recession of working faces, should be charged to expense rather than capital because they merely served to maintain the *status quo* and did not increase output nor reduce the cost of production. The Bureau of Internal Revenue, and at first the Board of Tax Appeals,⁴ held these items to be capital nevertheless.

³ In the Revenue Act of 1932 (subsequent to that which controls the du Pont case), Congress made a special exception for investors in "unimproved and unproductive real property" by allowing their carrying charges to be charged to capital account if they had not been deducted in income account. (Revenue Act of 1932, § 113 (b) (1) (A)). But even today this has not not been extended to anything except unimproved real estate.

⁴ *Marsh Fork Coal Co. v. Commissioner*, 11 B. T. A. 685.

The courts took the opposite view⁵ and the Board of Tax Appeals followed their decisions.⁶ The Commissioner of Internal Revenue at first published non-acquiescences in the decisions of the Board, but in 1933 recognized the validity of the ruling laid down by the courts and the Board and published Treasury Decision 4376⁷ and amended the Regulation quoted above to read as follows:

Expenditures for plant and equipment and for replacements, not including expenditures for maintenance and for ordinary and necessary repairs, shall ordinarily be charged to capital account recoverable through depreciation. Expenditures for equipment (including its installation and housing) and for replacements thereof, which are necessary to maintain the normal output solely because of the recession of the working faces of the mine, and which (1) do not increase the value of the mine, or (2) do not decrease the cost of production of mineral units, or (3) do not represent an amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made, shall be deducted as ordinary and necessary business expenses.

Subsequently the Board of Tax Appeals has held that this rule is not limited to mining companies but has applied

⁵ *United States v. Roden Coal Co.* (C. C. A. 5, 1930), 39 F. (2d) 425; *Marsh Fork Coal Co. v. Lucas* (C. C. A. 4, 1930), 42 F. (2d) 83; *Commissioner v. Brier Hill Collieries* (C. C. A. 6, 1931), 50 F. (2d) 777.

⁶ *West Virginia-Pittsburgh Coal Co. v. Commissioner*, 24 B. T. A. 234 (1931); *Tennessee Consolidated Coal Co. v. Commissioner*, 24 B. T. A. 369 (1931); *Preston County Coke Co. v. Commissioner*, 24 B. T. A. 646 (1931); *Hutchinson Coal Co. v. Commissioner*, 24 B. T. A. 973 (1931); *Cunard Coal Co. v. Commissioner*, 26 B. T. A. 234 (1932).

⁷ XII-2 C. B. 117.

it to a shoe company,⁸ and has indicated that it would be applicable to a gasoline refining company under proper proof.⁹

The most recent decision of the Board of Tax Appeals at all parallel to the instant case is that in *Paul J. Bonwit v. Commissioner*, Docket No. 92548, promulgated September 5, 1939.¹⁰ The opinion of the Board on the third issue before it was as follows:

"The third issue presents the deductibility of the \$500. annuity paid by the petitioner to Clara Philipsborn. The petitioner asserts that his trade or business was that of being chief executive of Bonwit Teller & Company of Philadelphia. With this statement of facts we agree. In *George S. Groves*, 38 B. T. A. 727 (Dec. 10, 1948), we said:

Even if petitioner had been but the active president of an operating corporation upon a salary, his activities would have been recognized as carrying on a trade or business within the meaning of the statute. *Ralph C. Holmes*, 37 B. T. A. 865 (Dec. 10, 1929) (on review, CCA 2d Cir).

"So long, therefore, as the petitioner remained the president and acting head of the company he continued to be in a trade or business and was entitled to deductions for all ordinary and necessary expenses relating to that business. The record shows that he retired from the company in 1934 but does not disclose the exact date. However, the respondent makes no objection to the allowance of the deduction on that ground.

⁸ *International Shoe Co. v. Commissioner*, 38 B. T. A. 81 (1938).

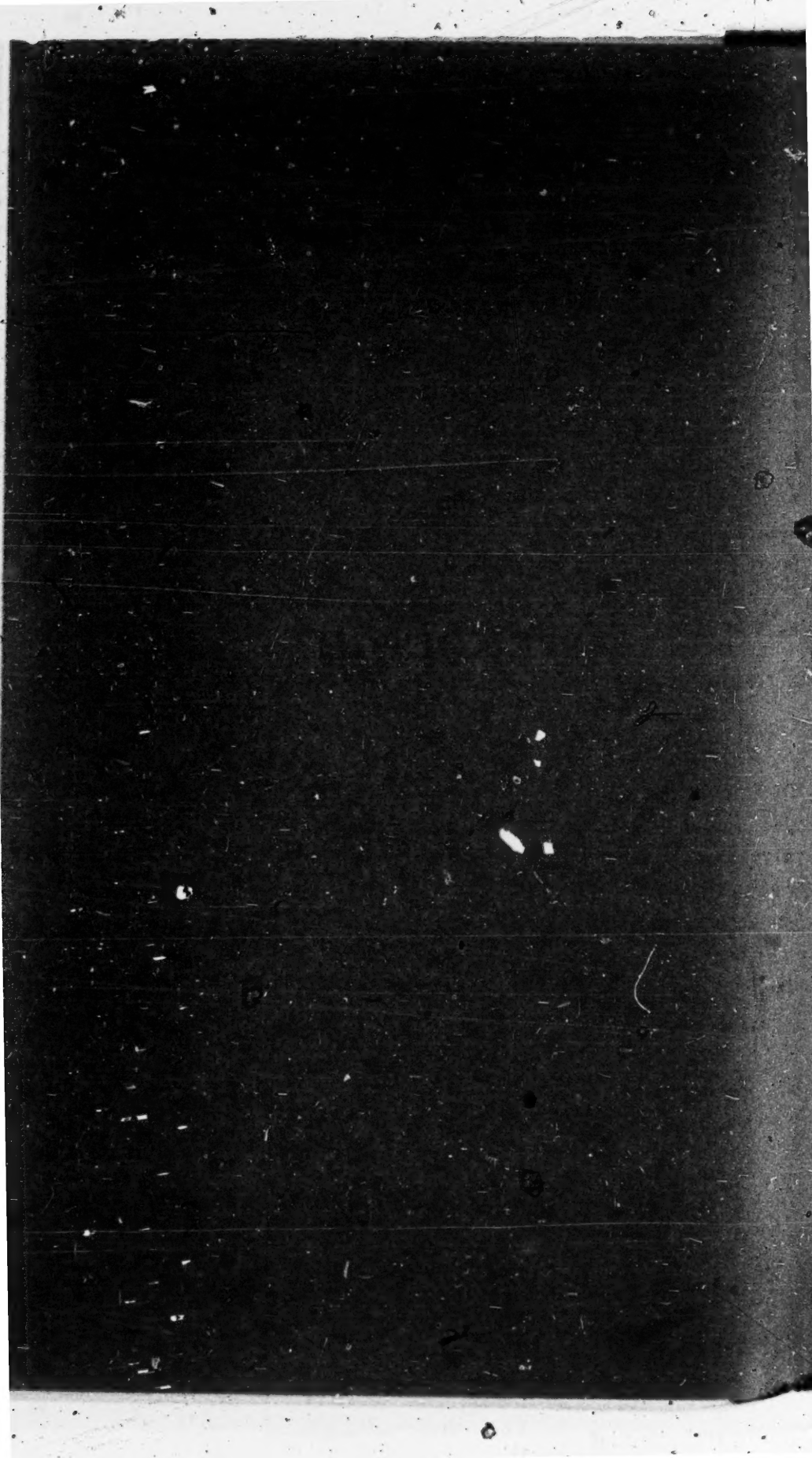
⁹ *Rainbow Gasoline Corp. v. Commissioner*, 31 B. T. A. 1050 (1935).

¹⁰ A memorandum opinion published in Commerce Clearing House Board of Tax Appeals Service for 1939 at page 29,933.

"The expenditure was shown to be necessary to the company's welfare and hence to the petitioner's trade or business as its president. The facts and circumstances surrounding the agreement of the petitioner and Rosenbaum each to make an additional yearly payment to Mrs. Philipsborn do not present such an extraordinary situation as to make the statute inapplicable. See *First National Bank of Skowhegan, Maine*, 35 B. T. A. 876 (Dec. 9626); *Edward J. Miller*, 37-B. T. A. 830 (Dec. 10,024); *International Shoe Co.*, 38 B. T. A. 81 (Dec. 10,090).

"The purchase of the Philipsborn stock was obviously not a customary recurrent event, habitual to the petitioner's business but it was of such a character as might normally appear in any corporation whose stock is held by a potentially adverse interest. Likewise, the action of the petitioner and Rosenbaum, taken in order to accomplish the stock purchase, is by no means unusual. It was considered by all parties essential to the success of the move. There is no suggestion that it was prompted by any other motive than the preservation and the uninterrupted prosperity of the company's business.

"The respondent also contends that the payment was made in order to acquire capital assets. However, the company acquired the assets, not the petitioner. Later it made some distribution of them but not in proportion to the stockholdings. The petitioner obtained only a few shares. The primary purpose in purchasing the Philipsborn block of stock was to protect the company's business—and hence that of the petitioner—against its threatened acquisition by hostile interests. The deduction is allowed."



APPENDIX III.

AUTHORITIES ON MEANING OF "INTEREST."

A. CASES.

The cases are legion in which courts have defined "interest" as the compensation for the use or forbearance of a loan of money. But these cases all appear to fall into one or the other of two groups: (a) where the payment involved actually was for the loan of money, and (b) where the real question was the legislative intent in a statute against usury.

(i) *Cases where the courts were dealing with loans of money.*

In the cases in the first class, the courts used definitions sufficiently broad to cover the question before them, and cannot be presumed to have intended to decide, *obiter*, whether the word "interest" could not have a different connotation in a case where a mutuum other than a loan of money was involved.

What Mr. Justice Cardozo wrote of constitutional theory in *Snyder v. Massachusetts*, 291 U. S. 97, 114, is equally applicable to statutory construction. He said:

A fertile source of perversion in constitutional theory is the tyranny of labels. Out of the vague precepts of the Fourteenth Amendment a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule

because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence.

The cases cited in the Government brief, in support of a narrow definition of interest fall, with two exceptions,¹ in the first group of cases mentioned above—where use or forbearance of money was the subject of the litigation and there was no reason for any ruling as to whether there could be “interest” on a mutuum.

Those cases are (in alphabetical order):

Baltimore & Ohio Railroad Co. v. Commissioner, 78 F. (2d) 460. The railroad company offered unissued common stock to its shareholders, ratably, at a stated price, less certain amounts if they made payment in advance of issuance of the stock. The difference was computed at six per cent per annum on the advance payments for the time between payment and delivery of the stock. The railroad company treated the difference on its books as interest accrued.

It was held that no loan and no indebtedness was involved—that the price and discount indicated were a mere formula, and no amount was deductible, in computing income taxes, as “interest on indebtedness”.

Here was a mere sale of stock for future delivery—the reduction in price, even though computed at a fixed rate per annum, was not a payment in connection with any kind of a loan or of a debt.

City of Lincoln, Neb. v. Ricketts, 77 F. (2d) 425. The real question was whether money turned over by the city

¹ *Title Guaranty & Surety Co. v. Klein*, 178 Fed. 689, and *Dry Dock Bank v. American Life Ins. etc. Co.*, 3 N. Y. 344, which are usury cases discussed below, pp. 20a-21a.

to the trust company constituted a loan, as a bank deposit, or a trust fund. The contract provided for the payment of interest. Held that the provision for the payment of interest was inconsistent with the thought that the title to the money remained with the city—accordingly a loan, not a trust was involved. The definition of “interest” given by the court would have resulted in the same decision if it had read “Interest is the compensation . . . for a loan or the forbearance of a debt, regardless of whether the debt is in money or in other property repayable in kind”. Nothing indicates any intent on the part of the court to hold that there could not be “interest” on a mutuum.

Corbett Investment Co. v. Helvering, 75 F. (2d) 525. Corbett bequeathed to his widow, in lieu of dower, \$12,000 per annum for life out of the income and rents of real property devised to his grandsons subject to this charge. Later the widow released the estate and accepted the personal undertaking of the grandsons to pay her \$1000 per month. Still later the grandsons turned the real estate over to a corporation in exchange for its capital stock and its agreement to pay \$1000 per month to the widow.

Held that the payments to the widow were part of the purchase price of the property—capital items—not deductible by the corporation as interest. Nothing in this case sheds any light whatever, even by way of obiter dictum, on the problem before us.

Dry Dock Bank v. American Life Insurance etc. Co., 3 N. Y. 344. This was a usury case, discussed at p. 20a.

Fall River Electric Light Co. v. Commissioner, 23 B. T. A. 168. This case involved a question similar to that in *Old Colony Railroad Co. v. Commissioner*, 284 U. S. 552, discussed below. A loan of money was involved and a

broad construction of the income tax law was applied in favor of taxpayer. The definition of "interest" adopted was broad enough to cover the case before the Board, which had no question before it like that at bar.

Hayes v. Commissioner (Mass.) 158 N. E. 539. This case, like *New Orleans Land Co. v. Commissioner*, below, merely held that the entire purchase price of goods sold on time should be regarded as the sales price and no part of such price should be considered interest, taxable at a higher rate than profits on sale of goods. The doubt was resolved in favor of the taxpayer. This case is practically the converse of the *Baltimore & Ohio Railroad* case, *supra*.

Kishi v. Humble Oil & Refining Co., 10 F. (2d) 356. Held that defendants, having detained money, were liable for interest at statutory rate (Texas). There was no reason for an exclusive definition.

Maryland Casualty Co. v. Omaha Electric etc. Co., 157 Fed. 514. Headnote 5 reads:

Interest is a consideration paid for the use of money, or forbearance in demanding it when due; and so long as one retains money and has its use he can make no charge against another for interest thereon.

Nothing but use of money was involved here—so there could have been no possible intent on the part of the court to make its definition of interest exclusive.*

New Orleans Land Co. v. Commissioner, 29 B. T. A. 35. The sole question was whether on purchase of land part of payment was interest or it was all principal. No question of loan of something other than money is involved.

Old Colony Railroad Co. v. Commissioner, 284 U. S. 552. This case involved only a loan of money, so there was no reason for the court to pass on whether or not the

term "interest" was applicable to the consideration for loans of assets other than money. It said (p. 560):

And as respects "interest" the *usual* import of the term is the amount which one has contracted to pay for the use of borrowed money. (Emphasis supplied.)

Naturally, the *usual* import of the term is so, because loans of money are, today, much more usual than loans of other assets to be repaid in kind. That the definition was not intended to be exclusive is clear from the fact that the court referred only to amounts *contracted* for, although interest frequently is allowed in the absence of contract, under statutes and common law decisions.

It should be particularly noted that the court, later in its opinion said (p. 561):

If there were doubt as to the connotation of the term, and another meaning might be adopted the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer (citing numerous cases).

Title Guaranty & Surety Co. v. Klein, 178 Fed. 689. This was a usury case, discussed below at p. 21a.

Terbell v. Commissioner, 29 B. T. A. 44, discussed in text of brief, p. 24.

Westerfield v. Rafterly, 4 F. (2d) 590. Here there was no controversy over the meaning of "interest" and no reason for an exclusive definition. The dispute was whether "carrying charges" were currently deductible, or whether they constituted capital items. Cf. pp. 9a-10a above.

The District Court in its opinion (R. 241) cited certain other cases on the definition of "interest" which are not

cited in the Government's brief in this court. All of them are in the same category as the cases analyzed above. The courts were dealing with money indebtedness, and, in giving definitions of "interest", had no reason to consider whether that term was applicable in the case of a mutuum. The cases are:

Redfield v. Ystalyfera Iron Co., 110 U. S. 174. This case involved the right to interest on a judgment. The court held that where interest is given as damages it may be withheld if plaintiff has been guilty of laches. This makes it clear that the concept of "interest" can be broader than mere compensation for the use of money. The opinion contains no definition of "interest".

Loudon v. Taxing District of Shelby County, 104 U. S. 771. The plaintiff had been compelled to borrow money to carry out its contract and demanded that the defendant, in addition to the contract price and legal interest, reimburse it for the difference between the legal interest on the contract price and the interest plaintiff had paid out. The court held

all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due.

This patently is not an exhaustive definition—it does not even cover interest on a loan of money that is not due.

Appeal of Bettendorf, 3 B. T. A. 378. The Board held that interest allowed as damages—as in *Redfield v. Ystalyfera Iron Co.*, *supra*—was not deductible as "interest on indebtedness". The Board was not considering whether there could be interest on a mutuum.

(ii) *Usury cases.*

The second class of cases referred to above as containing definitions of "interest" are those involving the usury statutes where forfeitures or penalties are imposed upon persons charging excessive amounts for forbearance of loans. Since usury statutes are in derogation of the common right and are in word or effect penal statutes, they are construed strictly against those who invoke their provisions. The leading case is *Dry Dock Bank v. American Life Insurance & Trust Co.*, 3 N. Y. 344 (1850). It involved the New York statute against usury which prohibited excessive interest for the loan or forbearance of money, goods or things in action. By a complicated deal in foreign exchange (subject however to agreement that the pound Sterling should be regarded as equivalent to \$5.00), three banking institutions arranged what was in effect a loan of money. The court held that because it was in effect a loan of money the usury law applied. The court said (p. 355):

The terms "interest" and "forbearance" cannot be predicated of any other than a loan of money, actual or presumed. Interest is defined to be a *certain profit* for the use of the loan; and forbearance the giving of a further day, when the time originally limited for the return of the loan, has passed. Both imply that the thing loaned has an established value, so that the lender on its return, with the compensation fixed by law for the use and risk, may receive a "certain profit". Now this is true only of money, which is legally supposed to have a fixed, unchangeable value in itself, and to be consequently the true measure of the value of all other property. A fixed rate per cent on money, therefore, in contemplation of law, is supposed to give the lender a "certain profit", because the thing loaned is of the

same value at the end of the term as at its commencement.

It may be very good logic to hold that the terms "interest" and "forbearance" in a *usury statute* cannot be predicated of any other than a loan of money for the reasons given in the quotation above. But this does not mean that the word "interest" in a *tax statute* is restricted to that narrow limit.

At page 354 the court said:

The statute of Henry VIII enumerated, and prohibited, the various devices and expedients adopted by money lenders, to evade the previous laws against usury. The statute of 12 Ann. from which our own is substantially taken, followed the earlier legislation upon this subject, by a partial enumeration of these devices; while that statute, like our own, contains a general prohibition against taking, or securing, more than the legal rate of interest, *directly or indirectly*, for the loan or forbearance of any money, which rendered such enumeration unnecessary.

And at page 355 added:

"The true construction of the last two statutes, as I apprehend, is, and has been, that no more than the prescribed rate of interest should be taken, on a loan, or forbearance of money, *directly or indirectly*, by way of loan of goods, or choses in action, or in any other manner."

We submit that the logic of the court shown in the first quotation given above is probably sounder than its history reflected in the second and third quotations, and we refer this Court to the old English statutes which are reproduced below, at pp. 24a-35a.

The Government's brief also cites *Title Guaranty & Surety Co. v. Klein*, 178 Fed. 689, which was another case

involving the New York usury law. Without citing them by name, the court relied on the New York decisions which began with the *Dry Dock Bank* case, *supra*. This decision is only authority for the interpretation of usury laws and not for the meaning of "interest" when found elsewhere.

B. STATUTES.

Statutes Shedding Light on Meaning of "Interest,"

The Code of the District of Columbia, Title 17, Chapter 1, Section 1:

Rate of interest in absence of agreement.—The rate of interest in the District upon the loan or forbearance of any money, goods, or things in action, and the rate to be allowed in judgments and decrees, in the absence of express contract as to such rate of interest, shall be six dollars upon one hundred dollars for one year, and at that rate for a greater or less sum or for a longer or shorter time: *Provided*, That interest, when authorized by law, on judgments against the District of Columbia, shall be at the rate of not exceeding 4 per centum per annum. (Sept. 30, 1890, 26 Stat. 514, c. 1126; Mar. 3, 1901, 31 Stat. 1377; c. 854, sec. 1178; July 1, 1902, 32 Stat. 610, c. 1352.)

Similar statutes in the states fixing the legal rate of interest "upon the loan or forbearance of money, goods or things in action" are:

Alabama. Code of 1928, Chapter 308, Section 8563.

California. Act approved at General Election of November 5, 1918. Stats. 1919 lxxxiii (General Laws of California, 1923, p. 1384).

Colorado. Compiled laws, 1921, Section 3781.

Connecticut. Revised Statutes of 1930, Section 4066.

Hawaii. Revised Laws, Section 7055.

Illinois. Cahill's Illinois Revised Statutes, Chapter 74, Section 1.

Indiana. Burns Indiana Statutes, Chapter 19, Section 2004.

Maine. Revised Statutes, Chapter 57, Section 143.

Minnesota. Mason's Minnesota Statutes, Section 7036.

Nebraska. Compiled Statutes, 1929, Chapter 45, Sections 101, 102.

New Hampshire. Public Laws, 1926, Chapter 269, Section 15.

New Mexico. Annotated Statutes, 1929, Chapter 89, Section 109.

New York. General Business Law, Section 370.

North Dakota. Compiled Laws, 1913, Section 6073.

Utah. Revised Statutes, 1933, Title 44, Section 44-0-1.

Washington. Remington's Compiled Statutes, 1922, Section 7299.

Wisconsin. Wisconsin Statutes, 1935, Section 115.04.

Wyoming. Revised Statutes, 1931, Chapter 58, Section 101.

Other statutes substituting equivalent words for "money, goods or things in action", are:

Iowa. Code of Iowa Annotated, Title 23, Chapter 418: for the loan of money, or upon contract founded upon any sale or loan of real or personal property.

Kentucky. Carroll's Kentucky Statutes, Chapter 72, Section 2219:

loan or forbearance of money, or other thing of value.

Missouri. Revised Statutes, 1929, Section 4842: loan of money or other commodity.

New Jersey. Compiled Statutes, p. 5704, Section 1: loan of any money, wares, merchandise, goods and chattels.

South Carolina. Code of Laws, 1932, Section 6738: any contract arising in this state for the hiring, lending or use of money or other commodity.

Virginia. Code of 1924, Section 5551:

loan or forbearance of money or other thing.

West Virginia. Barnes West Virginia Code Annotated, 1923, Chapter 96, Section 5:

loan or forbearance of money or other thing.

*British Statutes Against Usury in Force at Various Times
Prior to the General Repeal of the Usury Laws in 1854.*

37 Henry VIII, c. IX (1545).

A BILL AGAINST USURY.

'Where before this Time divers and sundry Acts, Statutes and Laws have been ordained, had and made within this Realm, for the avoiding and Punishment of Usury, being a Thing unlawful, and of other corrupt Bargains, Shifts and Chevisances, (2) which Acts, Statutes and Laws been so obscure and dark in Sentences, Words and Terms, and upon the same so many Doubts, Ambiguities and Questions have risen and grown, and the same Acts, Statutes and Laws been of so little Force or Effect, that by reason thereof little or no Punishment hath ensued to the Offenders of the same, but rather hath encouraged them to use the same:' (3) For Reformation whereof, be it enacted by the King our Sovereign Lord, by the Assent of the Lords Spiritual and Temporal, and of the Commons, in this present Parliament assembled, and by the Authority of the same, That all and every the said Acts, Statutes and Laws heretofore made, of, for or concerning Usury, Shifts, corrupt Bargains and Chevisances, and every of them, and all Pains, Forfeitures and Penalties concerning the same, and every Part thereof, shall from henceforth be utterly void and of none Effect, to all Intents, Constructions and Purposes.

II. And be it further enacted by the Authority aforesaid, That no Person or Persons of what Estate, Degree or Condition soever he or they be, from and after the last Day of January next coming, shall by himself, Factor, Attorney, Servant or Deputy, sell his Merchandises or Wares to any Person or Persons; and within three Months next after, by himself, Factor, Attorney, Deputy, or by any other Person or Persons to his Use and Behoof, buy the same Merchandises or Wares, or any Part or Parcel thereof, upon a lower price, knowing them to be the same Wares or Merchandises that he before did so bargain and sell, upon the Pains and Forfeitures hereafter limited in this Estatute.¹

III. And be it also enacted by the same Authority, That no Person or Persons, of what Estate, Degree, Quality or Condition soever he or they be, at any Time after the said last Day of January next coming, by Way or Mean of any corrupt Bargain, Loan, Eschange, Chevisance, Shift, Interest of any Wares, Merchandises, or other Thing or Things whatsoever, or by any other corrupt or deceitful Way or Mean, or by any Covin, Engin or deceitful Way or Conveyance, shall have, receive, accept or take in Lucre or Gains for the forbearing or giving Day of Payment of one whole

¹ When a borrower goes to a lender and goes through the form of selling a chattel to the lender and taking an option for its repurchase at a higher price, this is obviously a device equivalent to the lending of money on pawn at interest, but it should be noted that Section 2 of the Statute of Henry VIII was aimed at the converse of this, where goods were loaned through the device of a sale and the lender repurchased them at a lower price, so that in effect it was the borrower of the goods, not the borrower of the money, who paid the premium for the loan; and the statute was aimed at this as much as at the converse device where the borrower of the money had to pay.

Year of and for his or their Money or other Things that shall be due for the same Wares, Merchandises, or other Thing or Things, above the Sum of ten Pound in the Hundred, and so after that Rate, and not above, of and for a more or less Sum, or for a longer or shorter Time, and no more or greater Gain or Sum thereupon to be had, upon the Pains and Forfeitures hereafter in this Act mentioned and contained.

IV. And be it further enacted by the Authority aforesaid, That if any Person or Persons, at any Time after the said last Day of January, do bargain and sell, or lay to Mortgage by any Way or Mean, any Manors, Lands, Tenements or Hereditaments, to any Person or Persons, upon Condition of payment or Non-payment of any Sum or Sums of Money to be had, paid or made at any Day certain, or before any such Day by him that shall so bargain, sell or lay to Mortgage the same Manors, Lands, Tenements or Hereditaments, that the same Person or Persons, to whom any such Manors, Lands, Tenements or Hereditaments shall be so bargained, sold or laid to mortgage, shall not by reason thereof have, ne take, in Lucre or Gains of the Issues, Revenues and Profits of the same Manors, Lands, Tenements, or Hereditaments, above the Sum of ten Pound in the Hundred for one whole Year, and so after the Rate above-paid for a more or lesser Sum, or for a longer or shorter Time, and no more, nor otherwise, upon the Pains, Forfeitures and Penalties hereafter in this present Estatute limited and expressed.

V. And be it further enacted by the Authority aforesaid, That if any Person or Persons, of what Estate, Degree, Quality or Condition soever he or they be, at any Time after the said last Day of January next coming, shall do any

Act or Acts, Thing or Things, contrary to the Tenor, Form and Effect of this Estatute, or of any Clause, Article or Sentence contained in the same, that then all and every Offender and Offenders therein, or in any Part thereof, shall forfeit and lose for every such Offence the treble Value of the Wares, Merchandises, and other Thing or Things so bargained, sold, exchanged or shifted, (2) and the treble Value of the Issues and Profits of the said Manors, Lands, Tenements and Hereditaments so had, taken or received by reason of any such Bargain, Sale or Mortgage, (3) and also shall have and suffer Imprisonment of his Body, and make Fine and Ransom at the King's Will and Pleasure; (4) the Moiety of which Forfeiture of the said treble Value shall be to the King, and the other Moiety to him or them that will sue for the same in any of the King's Courts, by Action of Debt, Bill, Plaint or Information, in which Action, Bill, Plaint or Information, no Wager of Law, Essoin or Protection shall be admitted or allowed.

VI. Provided alway, and be it enacted by the Authority aforesaid, That this Act, or any Thing therein contained, shall not in any wise extend to any lawful Obligation indorsed with a Condition, nor to any Statute or Recognizance made and to be made for the Payment of a lesser Sum, so that the same Obligation, Statute or Recognizance be made for a true, just and perfect Debt, or for the performance of any other true Covenants, made or to be made upon a just and true Intent had between the Parties, other than in Cases of Usury, Interest, corrupt Bargains, Shift or Chevisance; (2) ne yet shall extend to any Recovery, Fine Feoffment, Release, Confirmation or Grant made or to be made upon Condition with a true Intent, other than to such Recoveries, Fines, Feoffments, Releases, Confirmations and

Grants, as shall be made upon Condition extending to Usury, Interest, corrupt Bargains, Shifts or Chevisance; any Thing in this Statute contained, or any Law, Statute or Ordinance heretofore had used or made to the contrary notwithstanding.

21 James I, c. XVII. (1623)

An Act against Usury.

‘WHEREAS at this Time there is a very great Abatement in the Value of Land, and other the Merchandizes, Wares and Commodities of this Kingdom, both at Home, and also in foreign Parts whither they are transported; (2) and whereas divers Subjects of this Kingdom, as well the Gentry as Merchants, Farmers and Tradesmen, both for their urgent and necessary Occasions for the following their Trades, Maintenance of their Stocks and Employments, have borrowed, and do borrow divers Sums of Money, Wares, Merchandizes and other Commodities; (3) but by reason of the said general Fall and Abatement of the Value of Land, and the Prices of the said Merchandize, Wares and Commodities, and Interest in Loan continuing at so high a Rate as ten Pounds in the hundred Pounds for a Year, doth not only make Men unable to pay their Debts, and continue the Maintenance of Trade, but their Debts daily increasing, they are enforced to sell their Lands and Stocks at very low Rates, to forsake the Use of Merchandize and Trade, and to give over their Leases and Farms, and so become unprofitable Members of the Commonwealth, to the great Hurt and Hinderance of the same:’

II. Be it therefore enacted by the King’s most excellent Majesty, the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, That no

Person or Persons whatsoever, from and after the four and twentieth Day of June, which shall be in the Year of our Lord one thousand six hundred twenty and five, upon any Contract to be made after the said four and twentieth Day of June, shall take directly or indirectly, for Loan of any Monies, Wares, Merchandize or other Commodities whatsoever, above the Value of eight Pounds for the Forbearance of one hundred Pounds for a Year, and so after that Rate for a greater or lesser Sum, or for a longer or shorter Time; (2) and that all Bonds, Contracts and Assurances whatsoever made after the Time aforesaid, for Payment of any Principal or Money to be lent or covenanted to be performed, upon or for any Usury, whereupon or whereby there shall be reserved or taken above the Rate of eight Pounds in the hundred as aforesaid, shall be utterly void; (3) and that all and every Person and Persons whatsoever, which shall after the Time aforesaid, upon any Contract to be made after the said four and twentieth Day of June, which shall be in the Year of our Lord 1625, take, accept and receive, by Way or Means of any corrupt Bargain, Loan, Exchange, Chevisance, Shift or Interest of any Wares, Merchandize or other Thing or Things whatsoever, or by any deceitful Way or Means, or by any Covin, Engine or deceitful Conveyance, for the forbearing or giving Day of Payment for one whole Year, of and for their Money or other Thing, above the Sum of eight Pounds for the forbearing of one hundred Pounds for a Year, and so after that Rate for a lesser or greater Sum, or for a longer or shorter Time, shall forfeit and lose for every such Offence the treble Value of the Monies, Wares, Merchandizes and other Things so lent, bargained, sold, exchanged or shifted.

III. And be it further enacted by the Authority aforesaid, That all and every Scrivener and Scriveners, Broker

and Brokers, Solicitor and Solicitors, Driver and Drivers of Bargains for Contracts, who shall after the said twenty-fourth Day of June, which shall be in the Year of our Lord 1625, take or receive, directly or indirectly, any Sum or Sums of Money, or other Reward or Thing for Brocage, soliciting, driving or procuring the Loan or forbearing of any Sum or Sums of Money, over or above the Rate or Value of five Shillings for the Loan or forbearing of one hundred Pounds for a Year, and so ratably, or above twelve Pence for making or renewing of the Bond or Bill for the Loan, or forbearing thereof, or for any Counter Bond or Bill concerning the same, shall forfeit for every such Offence twenty Pounds, and have Imprisonment for Half a Year; (2) the one Moiety of all which Forfeitures to be to the King, our Sovereign Lord, his Heirs and Successors, and the other Moiety to him or them that will sue for the same in the same County where the several Offences are committed, and not elsewhere, by Action of Debt, Bill, Plaint or Information, in which no Escoin, Wager of Law or Protection to be allowed.

IV. This Act to continue for the Space of seven Years from the said four and twentieth Day of June, which shall be in the Year of our Lord 1625, and so to the End of the first Session of Parliament then next following.

V. Provided, That no Words in this Law contained shall be construed or expounded to allow the Practice of Usury in point of Religion or Conscience. [Made perpetual by 3 Car. 1. c. 4. §. 5. 2 H. 3. c. 5. 3 H. 7. c. 6. 11 H. 7. c. 8. 37 H. 8. c. 9. 5 & 6 Ed. 6. c. 20. 13 El. c. 8.]

12 Charles II, c. XIII.

An Act for the restraining the taking of excessive Usury.

'Forasmuch as the Abatement of Interest from Ten in the Hundred in former Times hath been found by notable Experience beneficial to the Advancement of Trade and Improvement of Lands by good Husbandry, with many other considerable Advantages to this Nation, especially the reducing of it to a nearer Proportion with Foreign States with whom we traffick: (2) And whereas in fresh Memory the like Fall from Eight to Six in the Hundred, by a late constant Practice hath found the like Success, to the general Contentment of this Nation, as is visible by several Improvements. (3) And whereas it is the Endeavour of some at present to reduce it back again in Practice to the Allowance of the Statute still in Force, to Eight in the Hundred, to the great Discouragement of Ingenuity and Industry in the Husbandry, Trade and Commerce of this Nation:'

II. Be it, for the Reasons aforesaid, enacted by the King's most Excellent Majesty, and the Lords and Commons in this present Parliament assembled, That no Person or Persons whatsoever, from and after the twenty-ninth Day of September in the Year of our Lord one thousand six hundred and sixty, upon any Contract, shall from and after the said twenty-ninth of September take directly or indirectly for Loan of any Monies, Wares, Merchandize or other Commodities whatsoever, above the Value of six Pounds for the Forbearance of one hundred Pounds for a Year, and so after that Rate for a greater or lesser Sum, or for a longer or shorter Time: (2) And that all Bonds, Contracts and Assurances whatsoever, made after the Time aforesaid for Payment of any Principal or Money to be lent, or covenanted to be performed, upon or for any Usury,

whereupon or whereby there shall be reserved or taken above the Rate of six Pounds in the Hundred, as aforesaid, shall be utterly void: (3) And that all and every Person or Persons whatsoever, which shall after the Time aforesaid, upon any Contract to be made after the said twentieth Day of September, take, accept and receive, by Way or Means of any corrupt Bargain, Loan, Exchange, Chevisance, Shift, or Interest of any Wares, Merchandize, or other Thing or Things whatsoever, or by any deceitful Way or Means, or by any Covin, Engine or deceitful Conveyance, for the forbearing or giving Day of Payment for one whole Year, of and for their Money or other Thing, above the Sum of six Pounds for the forbearing of one hundred Pounds for a Year, and so after that Rate for a greater or lesser Sum, or for a longer or shorter Term, shall forfeit and lose for every such Offence the treble Value of the Monies, Wares, Merchandize and other Things so lent, bargained, sold, exchanged or shifted.

III. And be it further enacted by the Authority aforesaid, That all and every Scrivener and Scriveners, Broker and Brokers, Solicitor and Solicitors, Driver and Drivers of Bargains for Contracts, who shall after the said twentieth Day of September take or receive directly or indirectly any Sum or Sums of Money, or other Reward or Thing, for Brokage, Soliciting, Driving or procuring the Loan, or forbearing of any Sum or Sums of Money, over and above the Rate or Value of five Shillings for the Loan or Forbearing of one hundred Pounds for a Year, and so rateably, or above twelve-pence for the making or renewing of the Bond or Bill for Loan, or for forbearing thereof, or for any Counterbond or Bill concerning the same, shall forfeit for every such Offence twenty Pounds, and have

Imprisonment for half a Year; (2) the one moiety of all which Forfeitures to be to the King our Sovereign Lord, his Heirs and Successors; and the other Moiety to him or them that will sue for the same in the same County where the several Offences are committed, and not elsewhere, by Action of Debt, Bill, Plaint or Information; in which no Essoin, Wager of Law or Protection to be allowed.

12 Ann., Stat. II, c. 16 (1713)

An Act to reduce the Rate of Interest, without any Prejudice to Parliamentary Securities.

Whereas the Reducing of Interest to ten, and from thence to eight, and thence to six in the Hundred, hath, from Time to Time, by Experience been found very beneficial to the Advancement of Trade, and Improvement of Lands: And whereas the heavy Burden of the late long and expensive War hath been chiefly born by the Owners of the Land of this Kingdom, by Reason whereof they have been necessitated to contract very large Debts, and thereby, and by the Abatement in the Value of their Lands, are become greatly impoverished: And whereas by Reason of the great Interest and Profit which hath been made of Money at Home, the Foreign Trade of this Nation hath of late Years been much neglected, and at this Time there is a great Abatement in the Value of the Merchandizes, Wares, and Commodities of this Kingdom, both at Home and in Foreign Parts, whither they are transported: And whereas for the Redress of these Mischiefs, and the preventing the Increase of the same, it is absolutely necessary to reduce the high Rate of Interest of six Pounds in the hundred Pounds for a Year to a nearer proportion with the Interest allowed for Money in Foreign States:

Be it therefore enacted by . . . That no Person or Persons whatsoever, from and after the nine and twentieth Day of *September* in the Year of our Lord one thousand seven hundred and fourteen, upon any Contract, which shall be made from and after the said nine and twentieth Day of *September*, take, directly or indirectly, for Loan of any Monies, Wares, Merchandize, or other Commodities whatsoever, above the Value of five Pounds for the Forbearance of one hundred Pounds for a Year, and so after that rate for a greater or lesser Sum, or for a longer or shorter Time; and that all Bonds, Contracts, and Assurances whatsoever, made after the Time aforesaid, for Payment of any Principal, or Money to be lent or covenanted to be performed upon or for any Usury, whereupon or whereby there shall be reserved or taken above the Rate of five Pounds in the Hundred, as aforesaid, shall be utterly void; and that all and every Person or Persons whatsoever, which shall after the Time aforesaid, upon any Contract to be made after the said nine and twentieth Day of *September*, take, accept and receive, by Way or Means of any corrupt Bargain, Loan, Exchange, Chevizance, Shift or Interest of any Wares, Merchandize, or other Thing or Things whatsoever, or by any deceitful Way or Means, or by any Covin, Engine, or deceitful Conveyance, for the forbearing or giving Day of Payment for one Whole Year, of and for their Money or other Thing, above the Sum of five Pounds for the forbearing of one hundred Pounds for a Year, and so after that a Rate for a greater or lesser Sum, or for a longer or shorter Term, shall forfeit and lose for every such Offence the treble Value of the Monies, Wares, Merchandizes, and other Things so lent, bargained, exchanged or shifted.

I. And be it further enacted by the Authority aforesaid, That all and every Scrivener and Scriveners, Broker

and Brokers, Solicitor and Selicitors, Driver and Drivers of Bargains for Contracts who shall after the said nine and twentieth Day of *September* take or receive, directly or indirectly, any Sum or Sums of Money, or other Reward or Thing for Brokage, soliciting, driving, or procuring the Loan, or forbearing of any Sum or Sums of Money, over and above the Rate or Value of five Shillings for the Loan, or forbearing of one hundred Pounds for a Year, and so ratably, or above twelve Pence, over and above the Stamp-Duties, for making or renewing the Bond or Bill for Loan, or forbeating thereof, or for any Counterbond or Bill concerning the same, shall forfeit ~~for~~ every such Offence twenty Pounds, with Costs of Suit, and suffer Imprisonment for Half a Year; the one Moiety of all which Forfeitures to be to the Queen's most Excellent Majesty, her Heirs and Successors, and the other Moiety to him or them that will sue for the same in the same County where the several Offences are committed, and not elsewhere, by Action of Debt, Bill, Plaint or Information, in which no Essoin, Wager of Law, or Protection shall be allowed.

C. THE ECONOMISTS.

SIR DUDLEY NORTH

Discourses upon Trade; principally directed to the Cases of the Interest, Coynage, Clipping, and Increase of Money. London 1691. [In the *Early English Tracts on Commerce*, ed. MacCulloch, London, 1856, p. 517.]

"Now as there are more Men to Till the Ground than have Land to Till, so also there will be many who want Stock to manage; and also (when a Nation is grown rich) there will be Stock for Trade in many hands, who either have not the skill or care not for the trouble of managing it in Trade. But as the Landed Man letts his Land, so these still lett their Stock; this latter is call'd Interest, but is only Rent for Stock, as the other is for Land."

A. R. J. TURGOT

Sur la Formation et la Distribution des Richesses (1766) [Œuvres de Turgot, Paris 1844].

§ 78. "Au marché, une mesure de blé se balance avec un certain poids d'argent; c'est une quantité d'argent qu'on achète avec la denrée; c'est cette quantité qu'on apprécie et qu'on compare avec d'autres valeurs étrangères.—Dans le prêt à l'intérêt, l'objet de l'appréciation est l'usage d'une certaine quantité de valeurs pendant un certain temps. Ce n'est plus une masse d'argent qu'on compare à une masse de blé; c'est une masse de valeurs qu'on compare avec une portion déterminée d'elle-même, qui devient le prix de l'usage de cette masse pendant un certain temps."

ADAM SMITH

Wealth of Nations (1776), II., 4.

“As the quantity of stock to be lent at interest increases, the interest, or the price which must be paid for the use of that stock, necessarily diminishes. . . .

“Almost all loans at interest are made in money, either of paper, or of gold and silver; but what the borrower really wants, and what the lender really supplies him with, is not the money, but the money's worth, or the goods which it can purchase By means of the loan, the lender, as it were, assigns to the borrower his right to a certain portion of the annual produce of the land and labour of the country, to be employed as the borrower pleases. The quantity of stock, therefore, or, as it is commonly expressed, of money which can be lent at interest in any country, is not regulated by the value of the money, whether paper or coin, which serves as the instrument of the different loans made in that country” [ibid. II. 4].

J. B. SAY

Traité d'Economie Politique. (1803). 1841 Ed. (Paris).

“L'intérêt des capitaux prêtés, mal à propos nommé *intérêt de l'argent*, s'appelait auparavant *usure* (loyer de l'usage, de la jouissance), et c'était le mot propre, puisque l'intérêt est un prix, un loyer qu'on paie pour avoir la jouissance d'une valeur.” [p. 384].

“Ce qu'on prête est une valeur accumulée et consacrée à un placement.” [p. 394.]

G. CASSEL

The Nature and Necessity of Interest. (Macmillan, 1903), p. 4.

"The lender had a right to compensation for any loss which he could prove that he had suffered in consequence of the loan. This compensation is the original meaning of our modern term '*interest*.' The right to compensation for the '*damnum emergens*' was first recognised; afterwards also that for the '*lucrum cessans*.' Nothing could be better calculated to establish the common nature of the interest on a person's own trade-capital and on the money he lent to other persons, than this right to compensation for a gain which the lender would have been able to make, had he not lent his money. This became still more evident when, as in Genoa, the opportunity of discounting bills was generally recognised as a ground for claiming the *lucrum cessans*. Thus '*interest*' more and more became the general term given to payments for business-loans, whilst '*usury*' was restricted to signify the payment for money-advances made for consumption."

CHARLES J. BULLOCK

Elements of Economics, 2d Edition (Silver Burdette & Co. 1913), p. 261.

"Since money is the medium by which most transfers of capital are made, and the standard by which its value is measured, an investment of capital is often called an investment of money, and interest is frequently said to be a payment for the use of money. Such a choice of terms does no harm if one is careful to remember that in most cases it is other things than money that are actually invested; and that interest is paid for productive capital, whatever its form may be."

F. W. TAUSSIG

Principles of Economics (Macmillan & Co. 1915).

Taussig points out (Vol. ii, pp. 30-31) that in early days, and today in non-commercial communities, most money lending was at high rates to the improvident or necessitous—usually persons in immediate need, timid, ignorant and anxious for privacy. Under these circumstances, the rates charged were not likely to be competitive. These were loans for consumption. He contrasts them with loans for production, saying (at p. 33 of Vol. ii):

“The tenant normally pays as rental a sum sufficient to reimburse the owner or landlord for repairs, depreciation, and such charges as insurance and taxes; and he pays him in addition a sum which constitutes a net income to the landlord, and which is the interest on his investment. . . .

“A postponement of satisfactions on the landlord's part is necessarily involved, and will not be accepted unless there is some inducement,—unless the tenant pays *more* than enough to repay the sum originally invested; that is unless interest is paid.”

At p. 35: .

“Pianos, the furniture in lodgings. . . . In these, wear and tear, and allowance for depreciation, play a larger part than in dwellings, and interest forms a smaller proportion of the gross rental.”

At p. 36:

“The most general statement of the conditions under which interest arises is that it results from an exchange for things future.”

At p. 37:

“§ 5. When once the payment of interest is a familiar and accepted fact, it is extended to all cases where present means are in one person's hand and are turned over to another person.”

THOMAS N. CARVER

Principles of Political Economy (Ginn & Co. 1919), p. 436.

"Interest a part of the general law of value and price. The price which is paid for the use of capital comes under the same law as the price which is paid for anything else."

E. R. A. SELIGMAN

Principles of Economics (Longmans Green & Co. 1923), p. 219.

"Yet the word 'interest' itself means difference. *Interesse* in Latin was the sum that lay between (*inter*) the original loan and its return. . . .

"Interest, in other words, is a discount, or difference between the present and future. . . . interest is the difference in value of a present over a future enjoyment."

At p. 395:

"To the ordinary man interest seems to be the payment for a loan of money, precisely as wealth seems to consist of a sum of money. In point of fact, however, interest is paid for the use of the capital which the money represents."

See particularly discussion on pp. 398-401.

At p. 533:

"The general interest rate is, as we know, the payment for the use of capital as a whole. The 'money rate' or 'discount rate' in the long run follows the general rate of interest, for a relative plethora or dearth of capital ultimately finds its way to the lending centres."

L. M. FRASER

Economic Thought and Language—A Critique of Fundamental Economic Concepts (Macmillan & Co. 1937).

Fraser does not give a definition of interest but it is notable that he classifies productive resources in four classes and names their products as follows:

- (1) Land Rent
- (2) Labor Wages
- (3) Capital Interest
- (4) Enterprise Profit

Apparently, irredeemable bonds are issued by British railroads just as consols are issued by the government. Fraser suggests (p. 279)—Suppose a farmer transfers land to the railroad company in exchange for irredeemable bonds. No money being loaned none to be repaid (except the interest). It is pointed out that he is in no different situation from the next farmer who turns his land over to the railroad under a perpetual lease and receives rent in perpetuity.

From the viewpoint of the economists, classifying income in the way Fraser does there would be no difference between interest on corporate bonds and dividends on corporate stock except that in the latter the rate of return and the principal amount recoverable are contingent. It may well be that Congress recognized that the term "interest" could be broad enough, if used alone, to include dividends on stock, and therefore it was careful, in providing for deductions from gross income, to limit the deductible interest to *interest on indebtedness*.

SUPREME COURT OF THE UNITED STATES.

No. 151.—OCTOBER TERM, 1939.

Pearl E. Deputy and the Sussex Trust
Co., a Corporation of the State of
Delaware, as Administratrix and Ad-
ministratrix of the Estate of Willard
P. Deputy, Deceased, Late Collector
of Internal Revenue, Petitioner,

vs.

Pierre S. du Pont.

On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Third Circuit.

[January 8, 1940.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case presents the question of whether respondent in computing his taxable net income for the year 1931 may deduct payments of \$647,711.56 made by him in that year to the Delaware Realty and Investment Co. (hereinafter called the Delaware Company). The deduction is sought either under § 23(a) of the Revenue Act of 1928 (45 Stat. 791) as "ordinary and necessary expenses paid or incurred during the taxable year in carrying on" the "trade or business" of respondent; or under § 23(b) as "interest paid or accrued within the taxable year on indebtedness." The Commissioner disallowed the deduction and determined a deficiency, which respondent paid and now seeks to recover. It is agreed that if the deduction is allowed, respondent is entitled to judgment for \$172,351.64. The judgment of the District Court against respondent (22 F. Supp. 589) was reversed by the Circuit Court of Appeals (103 F. (2d) 257). We granted certiorari because of the asserted inconsistency of that ruling with *Welch v. Helvering*, 290 U. S. 111, which construed the meaning of the words "ordinary and necessary expenses"; and with *Burnet v. Clark*, 287 U. S. 410, which limited such deductions to losses directly connected with the taxpayer's business.

Respondent's claim to the deduction arose out of the following transactions, briefly summarized. Respondent was beneficial owner of about 16% of the stock of E. I. du Pont de Nemours and Com-

pany (hereinafter called the du Pont Company). In 1919 the du Pont Company constituted a new executive committee composed of nine young men. For business reasons, it thought it desirable that these men have a financial interest in the company. Alleged legal difficulties stood in the way of the du Pont Company selling them the 9,000 shares desired.¹ Accordingly, respondent undertook to sell them 1,000 shares each. But since he did not have readily available that amount from his own holdings,² he borrowed 9,000 shares of the du Pont Company from Christiana Securities Company,³ under an agreement whereby he agreed to return the stock loaned in kind within ten years and in the interim to pay to the lender all dividends declared and paid on the shares so loaned.⁴ Respondent thereupon sold the shares to the nine executives, the purchase price being furnished by the du Pont Company.⁵ In October, 1929 when

¹ As stated by the District Court, counsel advised that the du Pont Company could issue stock only for money paid, labor performed, or real or personal property acquired; and that if the stock were to be issued for cash, it must first be offered to existing stockholders. According to the findings the du Pont Company did not have 9,000 shares of its stock, other than unissued stock; that stock was not then listed on the New York Stock Exchange; and the over-the-counter market was quite inactive. Nine thousand shares could not have been purchased on this market without substantially raising the price per share.

² Respondent had available only seventy four shares. He had a reversionary interest in two trusts which held 24,000 shares. And he was the owner of 29,125 shares of common stock of Christiana Securities Company out of a total of 75,000 shares issued and outstanding. That company was then the owner of 183,000 shares of common stock of the du Pont Company out of a total of 588,542 shares issued and outstanding.

³ *Supra*, note 2.

⁴ As security respondent gave Christiana Securities Company 3,800 shares of its capital stock. All dividends on that stock were to be paid to respondent.

⁵ These sales were made at the price of \$320 a share, that being approximately their book value. The du Pont Company loaned to each of the nine executives the necessary funds to purchase his 1,000 shares. They paid respondent \$2,880,000 in cash for the 9,000 shares. According to respondent's brief, he turned over this sum through transactions in General Motors stock which ultimately yielded him a great profit. See *du Pont v. Commissioner*, 37 B. T. A. 1193.

By March 1921, the stock of the du Pont Company had declined in value and the bargain made by the executives had become a disadvantageous one. Respondent thereupon offered to turn over 400 shares of the Christiana Securities Company (of a net value of \$160,000) to be held by the du Pont Company as additional collateral on the loan made to these executives, respondent to have the right to redeem those 400 shares by payment of \$160,000 on maturity of the loan, that payment, if made, to be applied to the loan. If respondent failed to redeem those shares, they were to become the property of the executives on payment of their loans. Meanwhile dividends on the 400 shares up to \$8,000 per annum were to go to the executives, the balance to respondent, who was, however, to return his portion to the executives if he did not redeem the

the ten-year period was about to expire, respondent did not have available the number of shares which he was obligated to return to Christiana Securities Company.⁶ Therefore, he arranged for a loan from the Delaware Company of the number of shares necessary to discharge that obligation.⁷ Under a contract with that company, respondent agreed to return in kind the number of shares loaned (plus any increase by stock dividend or otherwise) within ten years; to pay to the Delaware Company an amount equivalent to all dividends declared and paid on the borrowed shares until returned; and to reimburse the Delaware Company for all taxes accruing against it by reason of the agreement.

Pursuant to that agreement respondent paid the Delaware Company in 1931, the sum of \$567,648, being an amount equivalent to the dividends received by him during that period from the du Pont Company on the borrowed shares; and the sum of \$80,063.56, being the amount of the federal income tax imposed upon the lender by reason of the foregoing payments which it had received from respondent. These are the expenditures claimed as a deduction in the present suit.

The District Court concluded, on the basis of respondent's large and diversified investment holdings and his wide financial and business interests, that his business was primarily that of conserving and enhancing his estate. The petitioners challenge that conclusion, asserting that respondent's activities in connection with conserving and enhancing his estate did not constitute a "trade or business" within the meaning of § 23(a) of the Act.

But as we view the case it is unnecessary for us to pass on that contention and to make the delicate dissection of administrative practice which that would entail. For we are of the opinion that the deductions are not permitted either within the rule of *Burnet v. Clark* or *Welch v. Helvering*, *supra*, even though we were to assume that the activities of respondent constituted a business, as found by the District Court.

stock. This offer was accepted by the executives. Respondent when he proposed it, stated that he did so "as a large stockholder, and, perhaps, the one to be most benefited by the recovery in value of the Company's shares." He also stated that he wanted the executives to be "free of worry over the unexpected outcome" of the stock purchase plan.

⁶ Due to stock dividends and split-ups respondent was obligated to return to Christiana Securities Company 142,212 shares to replace the 9,000 shares which he had borrowed.

⁷ Respondent was not a stockholder of the Delaware Company, although it appears that his brother was one of its executive officers.

There is no intimation in the record that the transactions whereby the stock was borrowed were not in good faith or were entered into for any reason except a *bona fide* business purpose. Nor is there any suggestion that the transactions were cast in that form for purposes of tax avoidance. And it is true that as respects the dividends received by respondent and paid over to the Delaware Company, he was little more than a conduit. But allowance of deductions from gross income does not turn on general equitable considerations. It "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Ice Co., Inc. v. Helvering*, 292 U. S. 435, 440. "And when it comes to construction of the statutory provision under which the deduction is sought, the general rule that "popular or received import of words furnishes the general rule for the interpretation of public laws," *Maillard v. Lawrence*, 16 How. 251, 261, is applicable.

By those standards the claimed deduction falls for two reasons. In the first place, the payments in question do not meet the test enunciated in *Kornhauser v. United States*, 276 U. S. 145, since they proximately result not from the taxpayer's business but from the business of the du Pont Company. The original transactions had their origin in an effort by that company to increase the efficiency of its management by selling its stock to certain of its key executives. The respondent undertook to furnish the necessary stock only after the company had been advised that it could not legally do so. In that posture of the case these payments are no more deductible than were the payments made by the stockholder in *Burnet v. Clark*, *supra*, as a result of his endorsements of the obligations of his corporation. Those payments were disallowed as deductions from his gross income though they arose out of transactions which were intended to preserve his investment in the corporation. Similar payments were disallowed in *Dalton v. Bowers*, 287 U. S. 404. Hence, the fact that the transaction out of which the carrying charges here in question arose might benefit respondent does not bring it within the ambit of his alleged business of conserving and enhancing his estate. The well established decisions of this Court do not permit any such blending of the corporation's business with the business of its stockholders. Accordingly, the payments made under the 1919 agreement would certainly not be

deductible. And the fact that a new and different arrangement was made in 1929 with the Delaware Company does not alter the conclusion, for it is the origin of the liability out of which the expense accrues which is material. Otherwise carrying charges on any short sale whether or not related to the business of the taxpayer would be allowable as deductible expenses. That cannot be if the notion of proximate result implicit in the statutory words "expenses paid or incurred . . . in carrying on any trade or business" is to have any vitality.

In the second place, these payments were not "ordinary" ones for the conduct of the kind of business in which, we assume *arguendo*, respondent was engaged. The District Court held that they were "beyond the norm of general and accepted business practice" and were in fact "so extraordinary as to occur in the lives of ordinary business men not at all" and in the life of the respondent "but once."⁸ Certainly there are no norms of conduct to which we have been referred or of which we are cognizant which would bring these payments within the meaning of ordinary expenses for conserving and enhancing an estate. We do not doubt the correctness of the District Court's finding that respondent embarked on this program to the end that his beneficial stock ownership in the du Pont Company might be conserved and enhanced. But that does not make the cost to him an "ordinary" expense within the meaning of the Act. Ordinary has the connotation of normal, usual, or customary. To be sure, an expense may be ordinary though it happen but once in the taxpayer's lifetime. Cf. *Kornhauser v. United States*, *supra*. Yet the transaction which gives rise to it must be of common or frequent occurrence in the type of business involved. *Welch v. Helvering*, *supra*, 114. Hence, the fact that a particular expense would be an ordinary or common one in the course of one business and so deductible under § 23(a) does not necessarily make it such in connection with another business. Thus, it has been held that one who was an active trader in securities might take as deductions carrying charges on short sales since selling short was common in that business.⁹ But the

⁸ 22 F. Supp. 589, 597:

⁹ *Dart v. Commissioner*, 74 F. (2d) 845. Cf. *Terbell v. Commissioner*, 29 B. T. A. 44, aff'd 71 F. (2d) 1017, where such carrying charges were disallowed as deductions. The Board of Tax Appeals said, p. 45, "We have only the stipulated facts and there is no suggestion in those facts that the decedent was engaged in the business of making short sales or in dealing in securities generally."

carrying charges on respondent's short sale in this case cannot be accorded the same privilege under § 23(a). The record does not show that respondent was in the business of trading in securities. Nor does it show that a stockholder engaged in conserving and enhancing his estate ordinarily makes short sales or similarly assists his corporation in financing stock purchase plans for the benefit of its executives. As stated in *Welch v. Helvering, supra*, pp. 113-114: " . . . What is ordinary, though there must always be a strain of constancy within it, is none the less a variable affected by time and place and circumstance." One of the extremely relevant circumstances is the nature and scope of the particular business out of which the expense in question accrued. The fact that an obligation to pay has arisen is not sufficient. It is the kind of transaction out of which the obligation arose and its normalcy in the particular business which are crucial and controlling.

Review of the many decided cases is of little aid since each turns on its special facts. But the principle is clear. And on application of that principle to these facts, it seems evident that the payments in question cannot be placed in the category of those items of expense which a conservator of an estate, a custodian of a portfolio, a supervisor of a group of investments, a manager of wide financial and business interests, or a substantial stockholder in a corporation engaged in conserving and enhancing his estate would ordinarily incur. We cannot assume that they are embraced within the normal overhead or operating costs of such activities. There is no evidence that stockholders or investors, in furtherance of enhancing and conserving their estates, ordinarily or frequently lend such assistance to employee stock purchase plans of their corporations. And in absence of such evidence there is no basis for an assumption, in experience or common knowledge, that these payments are to be placed in the same category as typically ordinary expenses of such activities, e. g., rental of safe deposit boxes, cost of investment counsel or of investment services, salaries of secretaries and the like. Rather these payments seem to us to represent most extraordinary expenses for that type of activity. Therefore, the claim for deduction falls, as did the claim of an officer of a corporation who paid its debts to strengthen his own standing and credit. *Welch v. Helvering, supra*. And the fact that the payments might have been necessary in the sense that consummation of the transaction with the Delaware Company was beneficial to respondent's estate is of no aid. For Congress has not de-

erred that all necessary expenses may be deducted. Though plainly necessary they cannot be allowed unless they are also ordinary. *Welch v. Helvering, supra.*

We conclude then on this phase of the case that as the District Court, on a correct interpretation of the Act, found that these payments did not proximately result from, and were not ordinary expenses for the conduct of, respondent's alleged business, it was error for the Circuit Court of Appeals to reverse the judgment for petitioners. *McCaughn v. Real Estate Land Title & Trust Co.*, 297 U. S. 606.

There remains respondent's contention that these payments are deductible under § 23(b) as "interest paid or accrued . . . on indebtedness." Clearly respondent owed an obligation to the Delaware Company. But although an indebtedness is an obligation, an obligation is not necessarily an "indebtedness" within the meaning of § 23(b). Nor are all carrying charges "interest". In *Old Colony Railroad Co. v. Commissioner*, 284 U. S. 552, this Court had before it the meaning of the word "interest" as used in the comparable provision of the 1921 Act (42 Stat. 227). It said, p. 560, " . . . as respects 'interest', the usual import of the term is the amount which one has contracted to pay for the use of borrowed money." It there rejected the contention that it meant "effective interest" within the theory of accounting or that "Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term." p. 561. It refused to assume that the Congress used the term with reference to "some esoteric concept derived from subtle and theoretic analysis." p. 561.

We likewise refuse to make that assumption here. It is not enough, as urged by respondent, that "interest" or "indebtedness" in their original classical context may have permitted this broader meaning.¹⁰ We are dealing with the context of a revenue act and words which have today a well-known meaning. In the business world "interest on indebtedness" means compensation for the use or forbearance of money.¹¹ In absence of clear evidence to the con-

¹⁰ Respondent refers to the *mutuum* in Roman Law. Ledlie's, Sohm's Institutes of Roman Law (2d. Ed.), p. 395; Hare, The Law of Contracts, p. 73.

¹¹ This makes irrelevant other lines of authority cited by respondent where "interest" in a different context has been used to describe damages or compensation for the detention or use of money or of property. See *United States v. North Carolina*, 136 U. S. 211, 216; N. Y. General Business Law, § 370, which provides, "The rate of interest upon the loan or forbearance of any money, goods, or things, in action . . . shall be six dollars upon one hundred dollars, for one year, . . ."

trary, we assume that Congress has used these words in that sense. In sum, we cannot sacrifice the "plain, obvious and rational meaning" of the statute even for "the exigency of a hard case." See *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, 370.

Petitioners throughout have referred to these payments by respondent as being capital in nature. Cf. *Bonwit-Teller & Co. v. Commissioner*, 53 F. (2d) 381; *Hutton v. Commissioner*, 39 F. (2d) 459; *Bing v. Helvering*, 76 F. (2d) 941. What appropriate treatment may be accorded these items of cost under other provisions of the Act we do not undertake to say, as that issue is not here.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 151.—OCTOBER TERM, 1939.

Pearl E. Deputy, and the Sussex Trust Co., a Corporation of the State of Delaware, as Administratrix and Administrator of the Estate of Willard P. Deputy, Deceased, Late Collector of Internal Revenue, Petitioner,

vs.

Pierre du Pont.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 8, 1940.]

Mr. Justice FRANKFURTER, concurring.

What the activities of a tax payer are is an issue for determination by triers of fact. Whether such activities constitute a "trade or business" as conceived by § 23(a) of the Revenue Act of 1928 (45 Stat. 791, 799); is open for determination here unfettered by findings and rulings below except for the weight of the intrinsic authority of all lower court opinions. To avail of the deductions allowed by § 23(a), it is not enough to incur expenses in the active concern over one's own financial interest. " . . . carrying on any trade or business", within the contemplation of § 23(a), involves holding one's self out to others as engaged in the selling of goods or services. This the taxpayer did not do. Expenses for transactions not connected with trade or business, such as an expense for handling personal investments, are not deductible. It is otherwise with losses. § 23(e)(2). Without elaborating the reasons for this construction and not unmindful of opposing considerations, including appropriate regard for administrative practice, I prefer to make the conclusion explicit instead of making the hypothetical, litigation-breeding assumption that this tax payer's activities, for which expenses were sought to be deducted, did constitute a "trade or business".

Mr. Justice REED joins in these views.

SUPREME COURT OF THE UNITED STATES

No. 151.—OCTOBER TERM, 1939.

Pearl E. Deputy and The Sussex Trust Company, etc., Petitioners, vs. Pierre S. duPont.	} On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
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[January 8, 1940.]

Mr. Justice ROBERTS.

I feel constrained to state my views, not because this case raises any important issue of law which should be settled by this court; but, on the contrary, because I think it presents a question the answer to which depends solely upon the facts disclosed by the record. Decision of the controversy cannot be helpful in the administration of the Revenue Acts or set any important precedent. I think the writ should not have been granted and that it now should be dismissed as improvidently granted. The amount of taxes involved or the insistence of the Government that the court below erred in its application of the law to the facts are not adequate reasons for review. There is no dispute as to principle and no conflict with any case in the application of any principle.

The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of reexamining the correctness of the result. (See Rule 38, par. 5.)

The dominant purpose evidenced by the income tax statutes is to tax net income. The policy is to credit against gross income the expenses of the business which begets earnings. The taxpayer is entitled to deduct that which he reasonably and in good faith ex-

pended in the effort to realize a profit. The revenue acts have always characterized deductible expenses as the ordinary and necessary expenses of the business, incurred and paid during the taxable year. The opinion assumes that the expenditure here in question was necessary in the conduct of the taxpayer's business but holds that it was not an ordinary expense of that business. Obviously what is an ordinary expense of a given business must depend upon the nature and scope of the business, the nature and occasion of the expenditure, and other considerations which will emerge in each specific case. Necessarily the decision of one case will have alight, if any, bearing upon the proper decision of another. If this court is to take under review every dispute in which the Government and a taxpayer differ as to whether a given expenditure is an ordinary or an extraordinary expense of the taxpayer's business we shall be involved in the decision of myriad cases, each turning upon its own facts, without furnishing any light to the taxpayers for their future guidance. I think this is the result of the court's opinion. It is admitted that the fact that the expenditure occurred but once in the taxpayer's experience does not render it extraordinary. It must be admitted that the fact that it is a large transaction does not render it extraordinary. What the opinion does, in the upshot, is to canvass all the circumstances and reach, as I think, a conclusion based solely upon the peculiar facts of this single case. We have repeatedly warned the Bar and the public that this we will not do because we do not sit for any such purpose.

An added reason for refusing to decide the case is the admission that the Treasury and the Board of Tax Appeals in years past have held a similar expense incurred in earlier years an expense of the taxpayer's business. In a matter resting so much in judgment and discretion as the determination of what is ordinary and what extraordinary expenditure in a business the weight of a continued administrative construction is of peculiar importance; and we ought not now depart from the rule long observed that such practice is entitled to high consideration at the hands of the courts and should not be overturned unless clearly wrong and for the most cogent reasons.

Since the case has been taken and considered on the merits I think the judgment below should be affirmed. I need add little to the opinion of Judge Maris of the Circuit Court of Appeals, with

which I agree. The taxpayer borrowed stock in order to sell it for cash to others. His contract obligated him either to return the stock or to pay the carrying charges to the lender. What he paid was not technically interest but it was an expense necessary to his obtaining and using the stock. He had several alternatives: to pay the annual carrying charges, or to default, and, in that case, to go into the market to buy the stock and return it to the lender or to pay the lender the value thereof.

What was there extraordinary about this transaction as compared with the borrowing of any commodity other than stock for a business reason and with a business purpose? In the conduct of every business situations arise which must be met. The circumstance that such a situation had not theretofore arisen, or that the transaction was the first of its kind in the respondent's business experience, does not render it extraordinary in the sense in which the statute uses the term. The limitation placed by Congress upon the types of expenditures made deductible was intended to prevent evasion of payment of tax on true net income, which confessedly was not a motive in the present instance. I think that under the guise of enforcing the plain mandate of the statute the court is really reading into the law what is not there and what Congress did not intend to place there.

To suggest, even by indirection, that perchance the taxpayer's expenditure may be treated as a capital expenditure is, in my judgment, to keep the word of promise to the ear and break it to the hope. In my view the carrying charge of the taxpayer's loan was either an ordinary expense of his business or it was nothing of consequence under any provision of the statute.

Mr. Justice McREYNOLDS joins in this opinion.